

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 203

ELI LILLY AND COMPANY, APPELLANT,

vs.

SAV-ON-DRUGS, INC.

and
STATE OF NEW JERSEY

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW JERSEY

FILED JUNE 30, 1960

JURISDICTION NOTED OCTOBER 17, 1960

SUPREME COURT OF THE UNITED STATES

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[fol. A]

**IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

Docket No. A-70-59.

Civil Action

**ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,**

vs.

**SAV-ON-DRUGS, Inc., a corporation of the State of
New Jersey, Defendant-Respondent.**

On Appeal from Superior Court, Chancery Division,
Union County.

Sat-below: Scherer, J. S. C.

Appendix to Brief for Appellant

[fol. 1]

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, UNION COUNTY****Docket No. C-2465-58**

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant.

COMPLAINT—Filed July 3, 1959

Eli Lilly and Company a corporation of the State of Indiana, having its principal office in the City of Indianapolis, State of Indiana, complaining of the defendant, says:

1. For many years last past and at all times herein mentioned, plaintiff was and is now engaged in the production, sale and distribution of certain pharmaceutical preparations, commodities and products. Said products are listed in a certain book which will be presented to the Court at the time of hearing. Included in the products aforementioned are Gelseals 'Multicebrin' (Pan-Vitamins, Lilly), and Protamine, Zinc & Iletin (Insulin, Lilly) U-40. These products and all products set forth in the aforementioned book bear the trademarks or brand or name of plaintiff, Eli Lilly [fol. 2] and Company, the producer and owner thereof, and are sold in the State of New Jersey in fair and open competition with products of the same general class produced by others. Plaintiff is the sole owner of the right to use the trademarks, brands, names, labels and copy rights identifying said products. Each and all of said products have had and have a good reputation among wholesale and retail druggists, and with the public generally. Said products and the trademarks, brands, and names identifying them have been widely promoted both in the State of New Jersey and nationally and as a consequence of said promotions and as a consequence of the intrinsic merit of said products an extremely valuable good will attaches to them.

2. Said products have been and are now accordingly sold and distributed throughout the State of New Jersey and plaintiff enjoys a profitable business therefrom.

3. On or about the 3rd of January, 1938, plaintiff, in order to protect itself as the owner of its trademarks, brands and names identifying the said products so produced by it, and to protect its trade therein in the State of New Jersey, and to protect the public from the injuries of uneconomic practices in distribution recognized by the Fair Trade Act of the State of New Jersey (R. S. 56:4-3, et seq.), and to avail itself of the protection of the terms thereof, adopted a system of doing business with respect to said products whereby plaintiff established prices for the resale of its products within the State of New Jersey and announced to the trade that its products could not be resold at retail in said State of New Jersey at prices lower than the prices so specified and established. Plaintiff, to make the system effective, requested contracts from retailers under the terms of which retailers agreed not to resell plaintiff's products at prices lower than the prices which were established as aforesaid by plaintiff. Over 1,500 of said [fol. 3] contracts all identical in form and content relating to the resale of the commodities aforementioned produced and sold by plaintiff have been signed by retailers in the State of New Jersey. The defendants hereinafter named have had notice of the execution of the contracts aforementioned and of the minimum resale prices established pursuant to said contracts. A true copy of the contract aforementioned is annexed hereto and made a part hereof and marked "Exhibit A."

4. Retailers in the State of New Jersey have had since on or about January 17, 1938, full and complete knowledge of the system under which plaintiff has been operating its business and proposes to operate it and when any retailers, including defendant, acquired any of the products of plaintiff they did so with full knowledge of the facts aforesaid. After the announcement by plaintiff with respect to its system as heretofore set forth, retailers generally began to observe and conform with the terms of the said contracts and the said established prices of plaintiff, and price-

cutting on the articles produced and distributed by plaintiff, generally speaking, ceased, to the great benefit of the public generally and of the plaintiff, but as a result of the acts of the defendant hereinafter mentioned retailers represent that they will be unable to continue to observe and perform the terms of said contracts and to comply with the established price schedules of plaintiff because of the unfair competition to which they are subjected by defendant. Unless the acts of the defendant are prevented retailers will refuse to continue to comply with the terms of their contracts to the great injury and damage of plaintiff.

5. Plaintiff has been diligent and conscientious in the enforcement of its minimum resale price maintenance program hereinabove described. In addition to voluminous mailings of correspondence to retailers, telephone conversations [fol. 4] shoppings and personal visits, plaintiff has frequently invoked the processes of the courts against retailers guilty of selling plaintiff's products at prices less than those established by plaintiff as aforesaid. Prior to September, 1948, in the Court of Chancery of New Jersey, and subsequently in the Chancery Division of the Superior Court, plaintiff instituted legal proceedings and secured injunctive relief against offending retailers in the following cases, showing the docket number and date of entry of the injunction:

1. Ace Cut Rate Drugs, Inc. 123 682 1939 #31843 February 23, 1939	2. Central Drug Co. 124 569 1939 #40256 October 23, 1939
3. Clinton Cut Rate 129 418 1940 #49896 August 13, 1940	4. Weissbard Bros. 139 5 1941 #66000 February 3, 1942
5. Fay's Cut Rate Pharmacy 139 137 1941 #66001 June 10, 1941	6. Wolf Drug Co. 139 147 1941 #66002 June 12, 1941
7. Schuster's Drug Stores, Inc. 148 639 1945 #254 October 30, 1945	8. Dell's Cut Rate Lizzaeh's Pharmacy, Inc. 148 693 1945 #981 December 10, 1945

9. Heller's Pharmacy
148 692 1945
#1071
December 10, 1945

11. Court Drug Co.
158 143 1947
June 19, 1947

13. Ace Drug Store
158 317 1947
#R 4647
October 27, 1947

[fol. 5]

15. Central Drug Co. of
E. Rutherford
158 570 1948
#R 11264
April 21, 1948

17. Jarvis Drug Store
158 601 1949
#R 10726
April 29, 1948

19. Maek Drug Co.
C 290 1949
December 16, 1949

21. Drug Fair
C 1076 1950
February 9, 1951

23. Sharr Drug Co.
C 1145 1953
February 17, 1954

25. Bell's Drug Store
C 2166 1953
July 7, 1954

27. F. & M. Drug Co.
C 2231 1955
July 10, 1956

29. Highway Drug Co.
C 1470 1956
April 26, 1957

10. Master's Drug Co., Inc.
158 309 1947
#R 4599

12. Rubin Bros. Pharmacy, Inc.
158 149 1947
#R 3810
June 19, 1947

14. Rutherford Drug Store, Inc.
158 569 1948
April 21, 1958

16. Woods Drug Co.
158 587 1948
#R 10333
April 29, 1948

18. J. & J. Drug Co.
C 1473 1948
May 5, 1949

20. Charline's Cut Rate
C 1687 1949
May 12, 1950

22. Sussman's Drugs
C 1195 1950
February 23, 1951

24. Carolina Pharmacy
C 1143 1953
February 18, 1954

26. James P. Smith, Inc.
C 378 1955
December 5, 1955

28. Chase Drugs
C 612 1956
December 6, 1956

30. Modell's Shoppers World of
Bergen County, Inc.
C 2151 1956
June 20, 1957

31. Seymour Greenspan and
Joseph J. Hahn t/a
Wald Drugs
C 2118 1958
June 17, 1959

32. Bell's Drug Store of
Fanwood, Inc.
C 2119 1958
June 29, 1959

33. Bay Drug Co., Inc.
C 2120 1958
June 19, 1959

In addition thereto in cases number 1, 2, 8 and 20, above, orders adjudging defendant in contempt of court for violation of the injunctions aforesaid were obtained on application of plaintiff.

[fol. 6] 6. By means of the aforementioned litigation, by means of shopping various stores throughout the State of New Jersey, including those in the vicinity of defendant, by means of correspondence, telephone calls and personal visits, plaintiff has generally secured compliance with its fair trade program, with the exception of the defendant hereinafter named.

7. Defendant, Sav-On Drugs, Inc., a corporation of the State of New Jersey, is the owner and operator of a diversified retail store located at 215 East Front Street, in the City of Plainfield, County of Union and State of New Jersey; and among the products offered for sale and sold by defendant are pharmaceutical products and preparations, drugs and medicinal products, and included among these are the products of plaintiff, and particularly Protamine; Zinc & Iletin (Insulin, Lilly) U-40 and Gelseals 'Multiebrin' (Pan Vitamins, Lilly) and these are sold under the trade-marks, brands, names, labels and copyrights owned by plaintiff.

8. Defendant has had knowledge and notice of the contracts executed by plaintiff with retail dealers in the State of New Jersey under the provisions of the New Jersey Fair Trade Act (R. S. 56:4-3 et seq.), and of the minimum resale prices for the products aforementioned manufactured, distributed and sold by plaintiff as established and specified pursuant to the aforementioned contracts.

9. There has been for some time past, and continuing to the date hereof, practiced in the State of New Jersey by certain retail merchants a system of merchandising known as the "cooperative cash discount system." Pursuant thereto retailers purchase from a certain corporation known as The Sperry & Hutchinson Company quantities of cash discount tokens known as "S. & H. Green Cooperative Cash Discount Stamps" and thereafter present the same to retail customers [fol. 7] as part of and together with the purchase and sale of merchandise. Plaintiff is informed and believes that said retail customers are given one "S. & H. Green Cooperative Cash Discount Stamp" for each \$0.10 of cash given in payment. After receipt by the customer the said "S. & H. Green Cooperative Cash Discount Stamps" are pasted in books known as "S. & H. Green Stamp Collectors' Books" provided the customer for said purpose by participating retailers and therein accumulated. Upon accumulation of a stated number of said "S. & H. Green Cooperative Cash Discount Stamps" pasted in the stamp books aforesaid, redemption is made therefor by the said Sperry & Hutchinson Company in the form of merchandise referred to in advertisements by the Sperry & Hutchinson Company as "Distinguished Merchandise," selected by the customer in stores designated by the said Sperry & Hutchinson Company and known as "S. & H. Green Stamp Redemption Stores" which are situated in various locations within the State of New Jersey. Each said "S. & H. Green Stamp Collectors' Book" has provision for the insertion of 1,200 green stamps and when completely filled, plaintiff is informed and believes, has a redemption value of approximately \$2.50 in terms of the retail value of the merchandise for which redeemed and represents a cash discount to the purchaser on purchases for which green stamps are given by the retailer of approximately 2.08%. Among the various items of "Distinguished Merchandise" for which "S. & H. Green Cooperative Cash Discount Stamps" (pasted in "S. & H. Green Stamp Collectors' Books") may be redeemed in "S. & H. Green Stamp Redemption Stores" are included sporting goods (such as fishing tackle, rifles, athletic equipment), lawn and garden equipment and furniture, cameras

and other photographic equipment, watches, clocks, furniture such as lamps, tables, chairs, hassocks, desks, all of various styles and models, picnic supplies, appliances of [fol. 8] different kinds such as toasters, coffee pots and food mixers, glassware, cooking utensils, rugs, linen, radios, blankets, bedspreads, bath equipment, books, toys, infants' needs, and more, which need not be set out in complete detail. Said merchandise is listed and illustrated in a publication distributed by The Sperry & Hutchinson Company through participating retailers, known as the "S. & H. Distinguished Merchandise Idea Book," which said publication is from time to time revised in accordance with changes in merchandise made available for redemption by the said Sperry & Hutchinson Company. A specimen "S. & H. Distinguished Merchandise Idea Book" is annexed hereto and made a part hereof by reference and marked "Exhibit B." A specimen "S. & H. Green Stamp Collectors' Book" is also annexed hereto and made a part hereof by reference and marked "Exhibit C."

10. As part of and in furtherance of the objects of the "cooperative cash discount system" The Sperry & Hutchinson Company maintains a continuous program of advertising and public relations. Said program has as its primary purpose that of circulating as widely as possible among the buying public generally the concept of "dollar savings" associated with the purchase of merchandise from retailers participating in the "cooperative cash discount system" i. e., those who give "S. & H. Green Cooperative Cash Discount Stamps" with merchandise purchased. The emphasis of said advertising is upon the cash savings realized by the customers who receive said stamps with their purchase. See, for example, at 46 *Life Magazine*, No. 21, p. 76 (May 25, 1959), a full page advertisement announcing: "Over 27,000,000 Smart, Thrifty Women Agree: S. & H. Green Stamp Savers Come Out *Dollars Ahead*." A copy of said advertisement is annexed hereto as "Exhibit D" and made a part hereof by reference.

[fol. 9] 11. The "S. & H. Distinguished Merchandise Idea Book" is also employed for advertising purposes. The back cover of catalog #64 (annexed hereto as Exhibit B) pro-

claims: "Smart, Thrifty shoppers know that stores giving S. & H. Green Stamps feature low, low prices. They're just naturally dollars ahead right at the start. And, they're dollars ahead *again* thanks to the valuable gifts received through S. & H. So shop at the fine stores and service stations that give you S. & H. Green Stamps. You get *savings on top of savings*—you're dollars ahead."

12. Even the "S. & H. Green Stamp Collector's Book" is used for the purpose of transmitting the slogans and theories of the "cooperative cash discount system." Typical of these are:

"S. & H. Green Stamps enable the merchant to give you a discount on small as well as large cash purchases. It's an easy and profitable practice for you." p. 3.

"S. & H. Green Stamps permit your merchant to say Thank You in a tangible way." p. 17.

"Your Green Stamp book helps your bankbook grow. Do your shopping at the stores that give S. & H. Green Stamps and add to your savings." p. 27.

"Buy from the progressive merchant who gives you S. & H. Green Stamps. Save your stamps until you have a full book and get that extra something you always wanted." p. 29.

13. To secure to the individual retailer the benefits of the advertising program conducted by The Sperry & Hutchinson Company there is often placed conspicuously on the retailers' premises a distinctive sign or emblem identifying the retailer as one who gives "S. & H. Green Cooperative Cash Discount Stamps", thereby notifying the public of cash discounts given by the said retailer with sale of merchandise.

[fol. 10] 14. Prior to November 5, 1958, plaintiff received reports advising that defendant was offering for sale and selling plaintiff's products at less than plaintiff's established minimum resale prices. Accordingly, plaintiff wrote to defendant advising defendant of the reports so received and advising defendant further of plaintiff's contracts with retailers throughout the State of New Jersey pursuant to

the New Jersey Fair Trade Act and requesting compliance with plaintiff's established minimum resale price schedules. A copy of said letter is annexed hereto and made a part hereof by reference and marked "Exhibit E". Said letter was sent Certified Mail, Return Receipt Requested. As a result of additional reports of price cutting by defendant, plaintiff again wrote defendant on March 30, 1959, demanding compliance and a copy of said letter is also annexed hereto and made a part hereof and marked "Exhibit F".

15. On April 3, 1959, defendants offered for sale and sold plaintiff's Protamine, Zinc & Iletin (Insulin, Lilly) U-40, 10cc. for \$1.48, the fair trade price of which was then and is now \$1.48, and gave to the purchaser with the product aforementioned 14 "S. & H. Green Cooperative Cash Discount Stamps." Said sale, constituted a sale at less than plaintiff's established minimum resale prices by reason of the fact that the stamps aforementioned were redeemable for valuable merchandise when presented together with a stated number of others of the same kind to The Sperry & Hutchinson Company in the manner and at the places hereinabove described. Said sale is more particularly shown by the affidavits of Mildred Bilancetti and Michael Bilancetti annexed hereto.

16. On May 1, 1959, plaintiff, through its counsel, wrote to defendant advising defendant of said sale at less than the established minimum resale price and requesting defendant's written assurance that the practice of giving trading stamps with purchases of plaintiff's products would be discontinued. A copy of said letter is annexed hereto and made a part hereof by reference and marked "Exhibit G". The requested assurance was not given by defendant.

17. On May 7, 1959, defendant offered for sale and sold plaintiff's Gelseals 'Multiebrin' (Pan-Vitamins, Lilly) 100's for \$4.59, the fair trade price of which was then and still is \$5.08. With said merchandise defendant delivered to the purchaser 45 "S. & H. Green Cooperative Cash Discount Stamps". Said sale is more particularly shown by the affidavits of Frances Heyman and Norman Ellenport annexed hereto.

18. On May 20, 1959, defendant offered for sale and sold plaintiff's Protamine, Zinc & Iletin (Insulin, Lilly), U-40, 10cc., for \$1.48 the fair trade price of which was then and still is \$1.48, and delivered to the purchaser with the products aforementioned 14 "S. & H. Green Cooperative Cash Discount Stamps." Said sale is more particularly shown by the affidavits of Frances Heyman and Norman Ellenport annexed hereto.

19. On May 20, defendant offered for sale and sold plaintiff's Gelseals 'Multicebrin' (Pan-Vitamin, Lilly) 100's for \$4.59, the fair trade price of which was then and still is \$5.08 and delivered to the purchaser with the product aforementioned 45 "S. & H. Green Cooperative Cash Discount Stamps." Said sale at less than the established minimum resale price is more particularly shown by the affidavits of Eleanor Hanlon and Rita Waslin annexed hereto.

20. By reason of the foregoing acts of unfair competition, plaintiff has been and will in the future be seriously injured and damaged and its valuable good will identified with the aforementioned trademarks, names, brands, labels [fol. 12] and copyrights, will be seriously impaired in the following respects:-

(a) Dissatisfaction has been and will be created among retail dealers in the articles manufactured, distributed and sold by the plaintiff, and retailers will violate their contracts aforesaid with plaintiff in order to meet the aforementioned unfair competition;

(b) Price wars will be precipitated which will be disastrous and irreparably injurious to the plaintiff and to the retail dealers with whom plaintiff contracts in the distribution of its aforesaid products, with the result that the minimum prices of plaintiff will be violated generally, and the valuable good will of plaintiff will be destroyed;

(c) The incentive of retail dealers to handle the stock and sell the products of plaintiff will be destroyed;

(d) The consumers and the public generally will be led to believe that the prices charged by other retailers for the products of plaintiff under the contracts aforementioned

pursuant to the New Jersey Fair Trade Act, are unreasonable and exorbitant, which is not the fact, and will discontinue purchasing the said products.

Wherefore, plaintiff demands:

- (a) That defendant, its officers, agents, servants and employees, be enjoined and restrained from selling, advertising for sale and offering for sale at its store or otherwise, products of Eli Lilly and Company at less than the prices specified and established by plaintiff from time to time, pursuant to the provisions of the New Jersey Fair Trade Act, R. S. 56:4-3, et seq.
- (b) That defendant, its officers, agents, servants, and employees be enjoined and restrained from giving to purchasers of plaintiff's products "S. & H. Green Cooperative [fol. 13] Cash Discount Stamps" or any other token which may be redeemed for cash or merchandise where the number of such stamps or tokens given is computed entirely or in part with relation to the price paid by the customer for the purchase of plaintiff's product or products, and where the giving of such stamps or other tokens results in a sale of plaintiff's products at less than the established minimum resale prices of plaintiff.
- (c) That defendant, its officers, agents, servants and employees, be temporarily enjoined and restrained as aforesaid.
- (d) Damages in the sum of Twenty-Five Thousand Dollars (\$25,000.00).
- (e) Costs.
- (f) That plaintiff have such other and further relief as may be proper.

Lorentz and Stamler, Attorneys for Plaintiff, By
Joseph H. Stamler, A Member of the Firm.

ELI LILLY AND COMPANY.

Manufacturer-Retailer Contract

THIS AGREEMENT executed in duplicate by and between ELI LILLY AND COMPANY, an Indiana corporation of Indianapolis, Indiana, (hereinafter called Manufacturer) and
doing business at

STREET ADDRESS

POST OFFICE

STATE

(hereinafter called Retailer); WITNESSETH:

WHEREAS Manufacturer is engaged in the manufacture and sale of a complete line of pharmaceutical and biological commodities which are identified by its trade-marks, brands, and name, and which are in free, fair, and open competition with commodities of the same general class manufactured and distributed by others, and Retailer is engaged in the sale and distribution at retail of Manufacturer's "Identified Commodities" and of competitive commodities produced by others, and the parties hereto desire to avail themselves of the benefits of the Fair Trade Act enacted by the state in which Retailer does business, as shown above;

NOW, THEREFORE, the parties do hereby stipulate and agree as follows:

1. Manufacturer's "Identified Commodities" shall mean and include all products listed in Manufacturer's current catalog or in any revision thereof which bear or the labels or containers of which bear the trade-marks, brands, or name of Manufacturer and which are in free, fair, and open competition with commodities of the same general class produced or distributed by others.
2. Retailer hereby agrees not to sell, offer to sell, or advertise any of Manufacturer's "Identified Commodities" at less than the minimum retail resale prices therefor established by Manufacturer under Paragraph 3 hereof; provided, however, that such minimum retail resale prices shall not apply to sales made by Retailer to physicians, dentists, veterinarians, hospitals, or state, county, or municipal institutions.
3. The minimum retail-resale prices for Manufacturer's "Identified Commodities" shall be ten (10%) percent less than the List Prices respectively designated therefor in Manufacturer's current catalog or in any revision thereof, it being agreed that said catalog, together with any such revisions, shall be deemed to be incorporated herein as a part of this contract.
4. Manufacturer reserves the right to effect such changes in the "Identified Commodities" listed in its said catalog and in the minimum retail resale prices established herefor as it, in its sole discretion, may determine, and it is agreed that all such changes shall become effective and binding upon Retailer upon receipt of written or printed price revision sheets.
5. The following acts or practices shall be deemed to constitute a violation of Paragraph 2 hereof:
 - a. The giving by Retailer of anything of value, whether tangible or intangible, in connection with the sale of any of Manufacturer's "Identified Commodities."
 - b. The granting of any kind of a concession whatsoever in connection with the sale of Manufacturer's "Identified Commodities."
 - c. The sale of any merchandise in combination with the sale of Manufacturer's "Identified Commodities."
6. Retailer agrees not to knowingly sell any of Manufacturer's "Identified Commodities" to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof.
7. It is agreed that the minimum retail resale prices established under Paragraph 3 hereof shall not apply to any transaction specifically exempted from the operation of this Contract under the provisions of the Fair Trade Act of the state in which Retailer does business.
8. In consideration of the execution hereof by Retailer, it is agreed that to the extent permitted by law, Manufacturer will use every reasonable means to prevent the sale of its "Identified Commodities" by any dealer in competition with Retailer at prices less than the minimum retail resale prices established under Paragraph 3 hereof. In the performance of its obligations under this paragraph Manufacturer shall not be required to institute legal proceedings unless such action in Manufacturer's judgment is necessary and feasible, and, in determining this question Manufacturer may take into account, among other things, the expense involved and the pendency of similar actions.
9. This Contract shall be interpreted under and shall be subject to the limitations imposed by the Fair Trade Act of the state in which Retailer does business, and in the event any provision of this Contract shall be held invalid under such Act or under any other statute, law, or public policy, or in the event this Contract shall be held inapplicable with respect to any given set of facts or circumstances, then, or in either of such events, the remaining provisions of this Contract and its applicability to all other sets of facts or circumstances shall be unaffected thereby.
10. This Contract shall apply only to the resale of Manufacturer's "Identified Commodities" by Retailer within the state in which Retailer does business.
11. This Contract shall remain and continue in full force and effect until and unless the same is terminated as hereinafter provided. Either party hereto may cancel or terminate this Contract by giving not less than thirty (30) days' notice in writing to the other party of his intention so to do. Any notice under this Contract given by either party to the other shall be sufficient if it is deposited in the United States Mail in a duly stamped envelope and addressed to the party hereto at the address designated in the opening Paragraph of this Contract. The termination of this Contract by Retailer, under the terms of this Paragraph, shall not relieve it of any obligation imposed under the Fair Trade Act of the state in which Retailer does business, nor shall either of the parties hereto, by virtue of such termination, be deprived of any rights granted under such Act.

Executed this

day of

19

ELI LILLY AND COMPANY

By

MANUFACTURER

[fol. 16]

EXHIBIT "E" TO COMPLAINT

November 5, 1958.

Sav-On Drug
115 E. Front Street
Plainfield, New Jersey

Gentlemen:

We have been informed that you are selling Eli Lilly and Company products at prices below the minimum retail resale prices established for them in accordance with the provisions of the New Jersey Fair Trade Act. Specifically, it has been reported that you are selling NPH ILETIN (insulin, Lilly) U.S.P., M-340, U-40 at \$1.30, whereas the fair trade price for this product is \$1.48.

We are enclosing for your information duplicate copies of our regular form of Manufacturer-Retailer Fair Trade Contract which has been signed by a substantial number of retail druggists in the State of New Jersey and in your community and which is now in full force and effect. Under the provisions of these contracts, we have established minimum retail resale prices for our trademarked commodities at ten percent less than the list prices shown in our current Price List. You have been furnished with a copy of the Lilly Price List, and you are furnished with changes in this Price List at regular intervals.

Under the provisions of the New Jersey Fair Trade Act, you are required to adhere to the minimum retail resale prices which we have established for our products, as explained above, even though you may not have signed one of our Manufacturer-Retailer Fair Trade Contracts.

We trust that your future operations will be strictly in accordance with the obligations imposed upon you under the

[fol. 17] New Jersey Fair Trade Act, so that there will be no occasion for any further controversy or litigation.

Very truly yours,

ELI LILLY AND COMPANY
H. B. Blackwell
Legal Department

HBB:jj
Enclosure

Certified Mail—Return Receipt Requested

EXHIBIT "F" TO COMPLAINT

March 30, 1959.

Sav-On Drug
115 E. Front Street
Plainfield, New Jersey

Gentlemen:

We have again been informed that you are selling our products at prices below the minimum retail resale prices established for them in accordance with the provisions of the New Jersey Fair Trade Act. Specifically, it has been reported that you are selling Lilly ILETIN products below the fair trade prices.

You will recall that we wrote to you on November 5, 1958, concerning the sale of our products below the minimum retail resale prices; and we enclosed for your information duplicate copies of our Manufacturer-Retailer Fair Trade Contract. Under the terms of this contract, we have established minimum retail resale prices for products bearing [fol. 18] our trademarks, brands, or name at ten percent less than the list prices shown in our current Price List. Under the provisions of the New Jersey Fair Trade Act, you are obligated to uphold our minimum retail resale prices whether you have signed one of our contracts or not.

It is our policy to employ all reasonable means to require the uniform observance of the minimum retail resale prices which we have established, and in our general enforcement policy we are prepared to file suits for injunctions where contract violations cannot be adjusted on a voluntary basis.

We trust that your future operations will be in accordance with your obligations under the contract and under the New Jersey Fair Trade Act, so that there will be no occasion for further controversy or litigation.

Very truly yours,

ELI LILLY AND COMPANY

H. B. Blackwell

Legal Department

HBB:jj

Enclosure

Certified Mail—Return Receipt Requested

[fol. 19] *Duly sworn to by Louis V. Clemente, jurat omitted in printing.*

[fol. 20]

IN THE SUPERIOR COURT OF NEW JERSEY

UNION COUNTY

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION—

Filed August 5, 1959

To: Sav-On Drugs, Inc., defendant,
c/o Harold Drusé, Registered Agent,
7-9 Watchung Avenue,
Plainfield, New Jersey.

Sirs:

Please take notice that on Tuesday, August 11, 1959, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorneys shall apply to a judge of the Superior Court, Essex County, Chancery Divi-

sion, at the Hall of Records, Newark, New Jersey, for an Interlocutory Injunction restraining and enjoining you, your officers, agents, servants, employees and attorneys in fact, from selling, advertising for sale and offering for sale at your store or otherwise, products of plaintiff, Eli Lilly and Company, at less than prices from time to time fixed and established by plaintiff Eli Lilly and Company, pursuant to the New Jersey Fair Trade Act, N. J. S. 56:4-3 etc.

Please take further notice that at the time and place aforesaid the undersigned attorneys shall also apply for an Interlocutory injunction restraining and enjoining you, your agents, servants, officers, employees and attorneys in fact, from issuing to purchasers of products of plaintiff Eli Lilly & Company "S. & H. Green Cooperative Cash Discount Stamps" or any other token which may be redeemed for cash or merchandise where the number of such stamps or tokens given is computed entirely or in part with relation to the price paid by the customer for the purchase of plaintiff's product or products, and where the giving of such stamps or other tokens results in a sale of plaintiff's products at less than prices specified and established by plaintiff.

Lorentz & Stämller, Attorneys for Plaintiff, By
Melvin P. Antell, A Member of the Firm.

Dated: July , 1959.

[fol. 21]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF RICHARD L. BONELLO—Filed August 10, 1959

State of New Jersey,
County of Essex, ss.:

Richard L. Bonello, being duly sworn, according to law, upon his oath deposes and says:

1. I am employed by Lum, Fairlie and Foster, attorneys for defendant in the above action.

2. On Thursday, August 6, 1959, and Friday, August 7, 1959, at the direction of Warren E. Dunn, an associate in the firm of Lum, Fairlie and Foster, I went to the office of the Clerk of the Superior Court, Trenton, New Jersey to examine the pleadings and papers on file in the cases listed in paragraph 5 of the complaint in the above action.

3. I personally examined the pleadings and papers on file at the said clerk's office in all of said cases. Some of the said pleadings and papers were on microfilm, and as to those, my examination was accomplished by the use of a microfilm projector.

4. The said pleadings and papers contain no reference to the issuance of trading stamps in connection with the sale of plaintiff's fair trade products, nor in any other connection. There is no statement in said pleadings that the issuance of trading stamps with the sale of fair trade merchandise is in violation of the New Jersey Fair Trade Act, nor has the issuance of trading stamps with the sale of fair trade merchandise been enjoined by the Court in the actions listed in paragraph 5 of the complaint.

Richard L. Bonello

Sworn to and subscribed before me,
this 10th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

(Seal)

[fol. 22]

**IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY**

AFFIDAVIT OF WARREN E. DUNN—Filed August 10, 1959

**State of New Jersey,
County of Essex, ss.:**

Warren E. Dunn, being duly sworn, according to law, upon his oath deposes and says:

1. I am an attorney at law of New Jersey and an associate in the firm of Lum, Fairlie and Foster, attorneys for the defendant in the above action.
2. On Thursday, August 6, 1959, I telephoned the office of the Secretary of State of New Jersey and spoke with a Mr. Foster, an employee in the Corporate Records division of that office.
3. I requested that Mr. Foster check the records of the Secretary of State of New Jersey with reference to Eli Lilly and Company, the plaintiff in the above action.
4. I was informed by Mr. Foster that Eli Lilly and Company is not registered with the Secretary of State of New Jersey as a domestic corporation nor as a foreign corporation authorized to transact business in the State of New Jersey.
5. During said telephone conversation I requested that a Certificate of No Record be issued by the Secretary of State of New Jersey and mailed to Lum, Fairlie and Foster, with the cost of same to be charged to the account of said firm.
6. The said Certificate of No Record has not been received by Lum, Fairlie and Foster as of the date of this affidavit.
7. This affidavit is submitted as proof that Eli Lilly and Company, plaintiff in the above action, a corporation of the [fol. 23] State of Indiana (as appears from the complaint), is not registered with the Secretary of State of New Jersey.

as a foreign corporation authorized to transact business in the State of New Jersey.

8. This affidavit is further submitted in opposition to the plaintiff's motion for an interlocutory injunction, and in support of the defendant's contention that plaintiff has no right to maintain an action in the Courts of the State of New Jersey by reason of its being a foreign corporation transacting business in New Jersey without authorization from the Secretary of State of New Jersey.

Warren E. Dunn

Sworn to and subscribed before me,
this 10th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

[fol. 24]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

ORDER DENYING INTERLOCUTORY INJUNCTION—
August 12, 1959

This matter having been opened to the Court on August 11, 1959 by Lorentz & Stamler, attorneys for plaintiff (Joseph H. Stamler appearing), in the presence of Lum, Fairlie & Foster, attorneys for defendant, (William F. Tompkins and Warren E. Dunn appearing), Harold Druse of the New Jersey Bar and Casey, Lane & Mittendorf of the New York Bar (Robert W. Sweet appearing); of counsel to the defendant, upon plaintiff's notice of motion for an interlocutory injunction to restrain the defendant, its officers, agents, servants, employees and attorneys in fact, from selling, advertising for sale and offering for sale, products of the plaintiff at less than prices fixed by plaintiff pursuant to the New Jersey Fair Trade Act, R. S. 56:4-3 et seq., and further to restrain and enjoin the defendant, its agents, servants, officers, employees and attorneys in fact from issuing to purchasers of plaintiff's products,

S. & H. green co-operative cash discount stamps or of any token which may be redeemed for cash or merchandise where the number of such stamps or tokens given is computed entirely or in part with relation to the price paid by the customer for the purchase of plaintiff's products and where the giving of said stamps or other tokens results in the sale of plaintiff's products at less than prices fixed by plaintiff, and the Court having considered the verified complaint filed herein as well as the exhibits annexed thereto, the affidavits and briefs filed by the parties hereto, together with certain exhibits offered in evidence at the hearing, the argument of counsel thereon, and the Court having made the following findings of fact and conclusions of law for the purposes of this motion, to wit:

1. The plaintiff corporation is a corporation of the State of Indiana.
- [fol. 25] 2. The plaintiff corporation is not authorized to transact business in New Jersey as a foreign corporation.
3. The plaintiff corporation is transacting business in the State of New Jersey within the meaning of R. S. 14:15-3 and 14:15-5.
4. Pursuant to the laws of the State of New Jersey and the laws of the State of Indiana and the reciprocal provisions thereof regarding foreign corporations transacting business within each of said states, the plaintiff corporation has no present standing to maintain any suit, proceeding, action at law or in equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any Court in New Jersey;

Upon the foregoing findings of fact and upon hearing argument of counsel on August 12, 1959 as to the form of the Order, in the presence of Lum, Fairlie & Foster (Warren E. Dunn appearing) and Lorentz & Stamler (Melvin P. Antell appearing), for good cause shown,

It is on this 12th day of August, 1959

Ordered and adjudged that the plaintiff's motion for interlocutory injunction be and the same hereby is denied.

Everett M. Scherer, J. S. C.

[fol. 26]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTYNOTICE OF MOTION TO DISMISS COMPLAINT Filed
August 17, 1959To: Lorentz & Stamler, Esqs.,
Attorneys for Plaintiff,
11 Commerce Street,
Newark 2, New Jersey.

Sirs:

Please take notice that on Tuesday, August 18, 1959, at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorneys for defendant, Sav-On Drugs, Inc., will apply to the Superior Court of New Jersey, Chancery Division, Union County, at the Essex County Hall of Records, Newark, New Jersey, for an order dismissing the plaintiff's complaint upon the ground that plaintiff corporation, a foreign corporation not authorized to transact business in the State of New Jersey, is transacting such business and is therefore without standing to maintain the above action, and

Take further notice that in support of its application the defendant shall rely upon memorandum of law, affidavit of Samuel J. Sirota, affidavit of James P. Herring, copies of which shall be served upon you with this notice of motion, and defendant shall also rely upon the pleadings and other papers heretofore filed with the Court, and Exhibit D-1 marked in evidence on August 11, 1959.

Lum, Fairlie & Foster, Attorneys for Defendant,
Sav-On Drugs, Inc., By William F. Tompkins,
A Partner.

[fol. 27]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF SAMUEL J. SIROTA IN SUPPORT OF MOTION
—Filed August 17, 1959

State of New Jersey,
County of Essex, ss.:

Samuel J. Sirota, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by Lum, Fairlie & Foster, attorneys for defendant in the above action.
2. On Wednesday, August 12, 1959, at approximately 11:55 A. M. at the direction of Warren E. Dunn, an associate in the firm of Lum, Fairlie & Foster, I went to the Military Park Building, 60 Park Place, Newark, New Jersey.
3. At said time and place I examined the office directory in the building lobby and saw the following listing: "Eli Lilly—617".
4. I immediately proceeded by elevator to the sixth floor of said building and observed that the door to room 617 bears the following legend: "Eli Lilly & Company".

Samuel J. Sirota

Sworn to and subscribed before me
this 12th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

[fol. 28]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTYAFFIDAVIT OF JAMES P. HERRING IN SUPPORT OF MOTION
—Filed August 17, 1959State of New Jersey,
County of Essex, ss.:

James P. Herring, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the president of the defendant corporation, Sav-On Drugs, Inc. and make this affidavit in support of the defendant's motion to dismiss plaintiff's complaint.

2. The defendant corporation was organized in the State of New Jersey in or about 1954 and since its inception I have been personally active in the business operations of the defendant, particularly with the running of both stores which it operates in New Jersey. In or about 1954, the defendant corporation opened a retail drug store in Plainfield, New Jersey, and in or about 1958 defendant corporation opened a retail drug store in Carteret, New Jersey.

3. At both of said stores since their opening, products of the plaintiff, Eli Lilly and Company, have been sold.

4. To my knowledge, the plaintiff, Eli Lilly and Company, operates and maintains an office in the State of New Jersey, at No. 60 Park Place, Newark, New Jersey, telephone number Market 3-2721. I have never personally gone to that office but I have directed correspondence to it and particularly to Mr. L. Audino, who, to my knowledge, is an employee of Eli Lilly and Company and is in charge of that office. On several occasions I have telephoned that office and talked with Mr. Audino. My reason for calling Mr. Audino on the occasions mentioned was to advise him that certain retail druggists were selling products of the plaintiff below the fair trade price fixed by the plaintiff.

5. The plaintiff, Eli Lilly and Company maintains a sales force in the State of New Jersey and salesmen of

that company have called upon the defendant corporation at both of the stores above mentioned.

[fol. 29] 6. Mr. L. Haney is the Eli Lilly and Company salesman in New Jersey, Middlesex County area. Mr. Haney calls regularly at the defendant corporation's Carteret, New Jersey, store. I have personally met Mr. Haney and have on occasion made complaints to him that other retail druggists in the Carteret, New Jersey, area were selling the fair traded products of the plaintiff corporation below the established price.

7. When Mr. Haney calls at the defendant's Carteret, New Jersey store, he personally checks the stocks and inventories of Eli Lilly and Company products maintained there. He accepts orders for purchase of Eli Lilly and Company products.

8. Mr. Haney has advised the defendant corporation in connection with the opening of its Carteret, New Jersey, store that Eli Lilly and Company makes available to retail druggists certain advertising and promotional material without cost to the retail druggist. Mr. Haney offered to provide printed announcements for mailing to the medical profession in Carteret, New Jersey, area concerning the opening of the defendant's store in Carteret, New Jersey. These announcements were received from Eli Lilly and Company by the defendant corporation without cost to it and mailed to doctors in the Carteret, New Jersey area. To my knowledge Mr. Haney resides at 748 Canton Street, Elizabeth, New Jersey and his telephone number is Elizabeth 2-5343. Mr. Haney has provided the defendant corporation with his home address and home telephone number and has requested that he be contacted at home in connection with any matters arising from the sale of the products of Eli Lilly and Company at defendant's Carteret, New Jersey store.

9. Mr. Henry W. Gondyke is the Eli Lilly and Company salesman in New Jersey, Union County area. Mr. Gondyke calls regularly at the defendant corporation's Plainfield, [fol. 30] New Jersey, store. I have personally met Mr. Gondyke and have on occasion made complaints to him

that other retail druggists in the Plainfield, New Jersey, area were selling the fair traded products of the plaintiff corporation below the established price.

10. When Mr. Gondyke calls at the defendant's Plainfield, New Jersey store, he personally checks the stocks and inventories of Eli Lilly and Company products maintained there. He accepts orders for purchase of Eli Lilly and Company products.

11. Mr. Gondyke advised the defendant corporation in connection with the opening of its Plainfield, New Jersey, store that Eli Lilly and Company makes available to retail druggists certain advertising and promotional material without cost to the retail druggist. Mr. Gondyke offered to provide printed announcements for mailing to the medical profession in Plainfield, New Jersey, area concerning the opening of the defendant's store in Plainfield, New Jersey. These announcements were received from Eli Lilly and Company by the defendant corporation without cost to it and mailed to doctors in the Plainfield, New Jersey area. To my knowledge Mr. Gondyke resides at 1207 W. 7th Street, Plainfield, New Jersey and his telephone number is Plainfield 6-2055. Mr. Gondyke has provided the defendant corporation with his home address and home telephone number and has requested that he be contacted at home in connection with any matters arising from the sale of the products of Eli Lilly and Company at defendant's Plainfield, New Jersey store.

James P. Herring

Sworn to and subscribed before me
this 13th day of August, 1959.

Jean Robertson,
Notary Public of New Jersey.
My Commission Expires June 17, 1962.

[fol. 31]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTYAFFIDAVIT OF R. O. CLUTTER IN OPPOSITION TO MOTION
—Filed August 17, 1959County of Marion,
State of Indiana, ss.:

R. O. Clutter, being first duly sworn upon his oath, deposes and says:

That he resides at 7998 Oakland Road, Indianapolis, Indiana, and is the Assistant Secretary of Eli Lilly and Company.

The Eli Lilly and Company is an Indiana corporation engaged in the manufacture and sale of pharmaceutical products with its offices and principal place of business located in Indianapolis, Indiana.

That it sells pharmaceutical products to selected wholesale distributors located throughout the United States who in turn resell said products to the retail trade.

That it leases no sales offices, owns no real estate, maintains no warehouse or other place of business, and maintains no stock of goods in the State of New Jersey.

That its products sold to customers in the State of New Jersey are sold to wholesale distributors in interstate commerce pursuant to distributor contracts made in the State of Indiana.

That it does not sell to the retail trade; its activity in the State of New Jersey being limited to promotional and informational work performed by employees who do not accept orders for products. The primary purpose of said employees is to acquaint retail pharmacists, physicians, and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians, and hospitals will order Lilly products from local wholesale distributors.

[fol. 32] That Eli Lilly and Company has executed Manufacturer-Retailer Fair Trade Contracts with a substantial number of retail pharmacists in the State of New Jersey, all of said contracts having been accepted at Indianapolis, Indiana.

That the sales of said pharmaceutical products sold to customers located in the State of New Jersey are approximately 2.7 percent of the total domestic sales of said Eli Lilly and Company, said sales made to New Jersey customers being made in interstate commerce.

R. O. Clutter

Subscribed and sworn to before
me this 14 day of August, 1959:

Sara K. Denhart,
Notary Public.

My commission expires 11/25/62.

[fol. 33]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

AFFIDAVIT OF LEGNARD L. AUDINO IN OPPOSITION TO MOTION
—Filed August 17, 1959

State of New Jersey,
County of Essex, ss.:

Leonard L. Audino, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I reside at 21 Yorktown Terrace, Livingston, New Jersey, and am employed by Eli Lilly and Company, plaintiff herein, in the Marketing Division thereof as District Manager for the district known as the Newark District.

2. I am the lessee of an office located in the Military Park Building, 60 Park Place, Newark, New Jersey, said office being that referred to in the affidavit of Samuel J. Sirota filed in the within Complaint by the defendant. The plaintiff herein is not a party to that lease, nor does it enjoy any rights or obligations thereunder.

3. I am reimbursed by Eli Lilly and Company for all expenses incidental to the maintenance and operation of said office. There is also in said office one secretary in the employ of Eli Lilly and Company, who is paid by said company on a salary basis.

4. In my capacity as District Manager in the Marketing Division of plaintiff, there are employed under my supervision eighteen (18) detail men, referred to in the affidavit of James P. Herring, submitted by defendant herein, as "salesmen". Said detail men are paid on a salary basis by Eli Lilly and Company and receive no commissions. It is the function of said detail men only to visit retail pharmacists, physicians and hospitals and to acquaint same with the various products of Eli Lilly and Company, with a view to encouraging the purchase and use of said retail products by such institutions and professional men. The work of the [fol. 34] detail men is promotional and informational only. They do not accept orders under any circumstances for the purchase of Eli Lilly and Company products. Products of Eli Lilly and Company are sold to retailers in the State of New Jersey by wholesale distributors. On occasion, detail men of Eli Lilly and Company may, as a service to the retailer, receive an order for Eli Lilly and Company products only for the purpose of transmitting same to the wholesaler. Orders so received and transmitted are then subject to acceptance or rejection by the wholesaler. Under no circumstances may a detail man of Eli Lilly and Company enter into an agreement on behalf of the plaintiff for the sale of Eli Lilly and Company products to any customer.

5. In the course of performing their duties, the detail men of Eli Lilly and Company will, on occasion, with the permission of the retailer, examine the stocks and inventory of the retailer to ascertain whether the retailer may be carrying a sufficient supply to meet potential demand. After such examination, the detail man may thereafter make certain recommendations to the retailer relating to the enlargement of his available supply. Detail men also make available to the retail druggists advertising and promotional material free of any charge to the retail druggist.

Leonard L. Andino

Subscribed and sworn to before me
this 20th day of August, 1959.

Eleanor C. Hanlon,
A Notary Public of N. J.
My Comm. Expires 12/11/63.

[fol. 35]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

OPINION—Filed September 29, 1959

Decided September 29, 1959.

Messrs. Lorentz and Stamler (Messrs. Joseph H. Stamler and Melvin P. Antell appearing), Attorneys for Plaintiff.

Messrs. Lum, Fairlie & Foster (Messrs. William F. Tompkins and Warren E. Dunn appearing), Attorneys for Defendant.

Scherer, J. S. C.

Plaintiff is a corporation of the State of Indiana not authorized to transact business in the State of New Jersey. It does not have a certificate from the Secretary of State as required by N. J. S. 14:15-4. It filed the present suit to compel the defendant to comply with minimum prices fixed for the resale of plaintiff's products, in accordance with N. J. S. 56:4-3 et seq., generally known as the Fair Trade Act. The facts are substantially undisputed and appear in the affidavits filed by both parties.

Plaintiff is one of the largest dealers of pharmaceutical products in this country, if not in the world, and its products are distributed throughout the United States and in foreign countries. Its office and principal place of business is in Indianapolis, Indiana. Plaintiff's products within the United States are sold to selected wholesale distributors and in interstate commerce. It is said that the business done in New Jersey represents 2.7% of its domestic sales. Plaintiff does not sell directly to the retail trade, but its products reach the retail trade through wholesale distributors. Plaintiff says that it leases no sales office, owns no real estate, and maintains no warehouse or other place of business in this state. Its products are "fair traded" in New Jersey [fol. 36] under the above cited statute and it claims to have approximately 1500 contracts in effect in this state signed

by retailers of its products, under which these retailers agree to maintain the minimum price structure fixed by plaintiff.

Defendant is a retail drug company with stores in Plainfield and Carteret. Defendant did not sign any contract, but it admits having notice of the fact that plaintiff has fair trade contracts in force and that it is, therefore, bound by the provisions of the Fair Trade Act, unless its other defenses are sustained. Even though a non-signer, defendant must maintain plaintiff's minimum price structure. *N. J. S. 56:4-6; Lionel Corp. v. Grayson-Robinson Stores*, 15 N. J. 191 (1954), appeal denied 99 L. ed. 677, 348 U. S. 859 (1954).

The complaint charges that defendant sold plaintiff's products below the minimum prices fixed by it, in that in some instances, while selling at the minimum prices, it gave to its customers "S. & H. Green Cooperative Cash Discount Stamps," which are redeemable for merchandise, thus in effect lowering the prices of plaintiff's products below the minimum by the amount of the discount represented by the stamps. Whether this constitutes willfully and knowingly advertising or selling plaintiff's products at less than the prices stipulated by it—which defendant denies—need not be now decided. See *E. R. Squibb & Sons and Eli Lilly Company v. Charline's Cut Rate, Inc.*, 9 N. J. Super. 328 (Ch. Div. 1950); *Bristol-Myers Co. v. Picker*, 96 N. E. 2d 177 (Ct. App., N. Y. 1950); *Bristol-Myers Co. v. Lit Brothers, Inc.*, 6 A. 2d 843 (Sup. Ct., Pa. 1939); *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, 131 P. 2d 856 (Dist. Ct. App., Cal. 1942); *Sperry and Hutchinson Co. v. Margetts*, 15 N. J. 203 (1954). Defendant is charged also with violating the minimum price structure by selling other products of the plaintiff below the minimum prices in cases where no stamps were given. Plaintiff originally applied [fol. 37] for an interlocutory injunction (R. R. 4:67) to enjoin all sales by defendant below minimum prices until final hearing.

Defendant admitted the sales but denied that in any instance the sales were below minimum prices or that there were any willful and knowing sales below such prices, in violation of N. J. S. 56:4-6. With respect to the sales made

of products other than those with which stamps were given, defendant states that it made up packages from bulk shipments and that the products of plaintiff were packaged under defendant's name and, therefore, they were exempt under the provisions of N. J. S. 56:4-5(1). It is doubtful that this constitutes a good defense because the bottle which was marked in evidence clearly disclosed that the plaintiff's name and trademark appeared on the label, and defendant was obviously seeking to gain the benefit of plaintiff's good will. This may not be done. *Johnson & Johnson v. Weissbord*, 121 N. J. Eq. 585, 586 (E. & A. 1937).

The substantial defense interposed is that plaintiff, being a foreign corporation, was required as a condition precedent to transacting business in this state to file with the Secretary of State, under N. J. S. 14:15-3, a copy of its certificate of incorporation and a statement providing information required by that section, and, as a preliminary to instituting suit in this state "upon any contract made by it in this state," was required to obtain a certificate from the Secretary of State under N. J. S. 14:15-4. It is conceded that neither of the last cited sections has been complied with by the plaintiff.

Plaintiff's application for an interlocutory injunction was denied on the ground that its right to relief was not clear as a matter of law, in view of the above mentioned legal defenses. *General Electric Co. v. Gem Vacuum, Stores*, 36 N. J. Super. 234 (App. Div. 1955); *Wilentz v. Crown Laundry Service, Inc.*, 116 N. J. Eq. 40 (Ch. 1934); *Allman* [fol. 38] v. *United Brotherhood of Carpenters, etc.*, 79 N. J. Eq. 150, 155 (Ch. 1911).

The matter is now before the Court on defendant's motion to strike the complaint and for summary judgment on the ground that the plaintiff is transacting business in this state contrary to N. J. S. 14:15-3 and, being a foreign corporation, is precluded from bringing this action under N. J. S. 14:15-4. As an integral part of these defenses, the defendant urges the provision of N. J. S. 14:15-5, where it is provided as follows:

14:15-5. Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations

When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

The State of Indiana has a similar statute, and the requirements of that state upon foreign corporations are much more onerous than those imposed by our statute. The [fol. 39] Indiana statute (Burns Annotated Statutes of Indiana) provides:

"25-314: Penalties. No foreign corporation transacting business in this state without procuring a certificate of admission or, if such a certificate has been procured, after its certificate of admission has been withdrawn or revoked, *shall maintain any suit or proceeding in any of the courts of this state upon any demand, whether arising out of contract or tort;* and every such corporation so transacting business shall be liable by reason thereof to a penalty of not exceeding ten thousand dollars (\$10,000), to be recovered in any court of competent jurisdiction in an action to be begun and prosecuted by the attorney general in any county in which such business was transacted.

"If any foreign corporation shall transact business in this state without procuring a certificate of admis-

sion, or, if a certificate has been withdrawn or revoked, or shall transact any business not authorized by such certificate, such corporation shall not be entitled to maintain any suit or action at law or in equity upon any claim, legal or equitable whether arising out of contract or tort, in any court in this state; and it shall be the duty of the attorney general, upon being advised that any foreign corporation is so transacting business in this state, to bring action in the circuit or superior court of Marion County for an injunction to restrain it from transacting such unauthorized business and for the annulment of its certificate of admission, if one has been procured. * * * . (Emphasis supplied.)

Plaintiff argues that it is not doing business in this state and that, even if it be held that it is, the above cited provisions of our Corporation Act do not apply to it because its goods are distributed solely in interstate commerce, thus exempting it from the provisions of any regulatory state statute of the kind above quoted, and that to apply to it the provisions of N. J. S. 14:15-3, 4 and 5 is to impose a burden upon interstate commerce which is forbidden by the commerce clause of the Federal Constitution (*United States Constitution*, Article I, Sec. 8, Clause 3).

Plaintiff countered the motion to dismiss with a renewal of its motion for interlocutory injunction on the ground that, if the defendant's motion should be denied, then plaintiff's motion should be granted because then its right to relief as a matter of law would be clear, thus eliminating the reason for the original denial of its motion.

I.

Is the plaintiff doing business in New Jersey? The facts in the affidavits filed in support of the respective motions differ in only one material respect. Defendant says that plaintiff's salesmen, or "detailmen" as plaintiff calls them, in New Jersey accept orders for the purchase of plaintiff's products, while plaintiff denies this to be true and says that, even though on occasions its representatives may receive an order for plaintiff's products, they do so only for the

purpose of transmitting the same to the wholesaler and that such orders are subject to acceptance or rejection by such wholesaler. In view of the result reached, this fact is immaterial, but it will be assumed that the plaintiff's statement is correct.

The facts are these: Plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building. (The September 1959 issue of the Newark Telephone Directory lists the plaintiff both in the regular section and in the classified section under "Pharmaceutical Products" as having [fol. 41] an office at 60 Park Place, Newark.) The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino "for all expenses incidental to the maintenance and operation of said office." There is a secretary in the office, who is paid directly by the plaintiff on a salary basis. There are eighteen "detailmen" under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commission. Many, if not all of them, reside in the State of New Jersey. Whether plaintiff pays unemployment, or other taxes to the State of New Jersey is not stated. It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is "promotional, and informational only." On an occasion, these detailmen, "as a service to the retailer," may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield stores. Plaintiff says that all of its fair trade contracts and orders for its products are

subject to acceptance in Indiana, and therefore none of them constitutes a contract made, or order taken, in this state.

Despite the above recited facts, plaintiff insists that it is not doing business in New Jersey. It concedes that, per [fol. 42]haps for the purpose of having service of process made upon it in a suit in which it is a defendant, it might conceivably be properly served within this state. But, it says that, although it may be subject to the jurisdiction of the state courts and amenable to service of process therein when it is sued, it is not subject to the statute regulating foreign corporations or prescribing the conditions of their doing business in that state. 146 A. L. R. 942. The difference, it is claimed, is ascribable to the fact that the power of a state to subject a foreign corporation engaged in interstate commerce to local regulations is limited and restricted by the commerce clause of the Federal Constitution. On this subject, more hereafter.

The New Jersey Corporation Act does not define "transacting any business" in this state. Our Supreme Court, in *A & M Trading Corp. v. Pennsylvania R. Co.*, 13 N. J. 516 (1953), quoting with approval from *Yedwab v. M. A. Richards Corp.*, 137 N. J. L. 448 (Sup. Ct. 1948), observed that doing business is a term that is not susceptible of precise definition automatically resolving every case, and that each case turns upon its own circumstances.

To hold under the facts above recited that plaintiff is not doing business in New Jersey is to completely ignore reality. A corporation thus acting within this state should not be permitted to take advantage of the laws of this state which promote its business, such as the Fair Trade Act (which is the sole basis for this suit), and yet not comply with reasonable regulatory provisions of our Corporation Act. As is noted in 146 A. L. R. 957, where this subject is discussed in detail, many corporations selling products in the several states act, with a studied purpose, to avoid the necessity of conforming to state laws or becoming subject to service of process. *The Shovel Co. v. Superior Ct.*, 95 P. 2d 149 (App. Ct., Cal. 1939).

[fol. 43] Most of the cases in which the question of whether a corporation is or is not doing business in a particular state has arisen are those in which service of process was at-

tempted to be made upon a foreign corporation or a tax was sought to be assessed. See *Miklos v. Liberty Coach Co.*, 48 N. J. Super. 591 (App. Div. 1958); *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. ed. 95 (1945); *McGee v. International Life Ins. Co.*, 355 U. S. 220, 2 L. ed. 2d 223 (1957); *A & M Trading Corp. v. Pennsylvania R. Co.*, *supra*; *Westerdale v. Kaiser-Frazer Corp.*, 6 N. J. 571 (1951). The present case is the converse of those cited. Here, the plaintiff seeks not to avoid service, but to be permitted to sue:

If, as stated in the *Miklos* case (quoting from the *International Shoe Co.* case), at p. 598, "that in order to subject a foreign corporation to a judgment *in personam*, if it be not present within the territory of the forum, it have certain minimum contacts with (the forum) such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice,'" so the plaintiff here, in the interest of fair play and substantial justice, should not object to complying with the requirements of the Corporation Act and securing a certificate to do business here, thus enabling it to maintain its suit. This, however, the plaintiff refuses to do. It has been held that such a certificate is secured timely if taken out pending an action. *Lehigh, &c., Co. v. Atlantic S. & R. Works*, 92 N. J. Eq. 131, 148 (Ch. 1920). It has been stated that the effect of the *International Shoe Co.* case was to establish a rule that, where a foreign corporation is present within the state, the court looks not only to the regularity, continuity and extent of the corporate activity within the state, but also to whether the cause of action asserted resulted from the corporate activity within the state and the convenience to the parties. *Fletcher, Corporations*, Sec. 8713.1, pp. 419-420. [fol. 44] Plaintiff cites *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Sup. Jud. Ct., Mass. 1959), as an example of a case where a foreign corporation, under facts quite similar to those here, was held not to be doing business in Massachusetts and was not required to secure a certificate to do business as a condition precedent to securing relief under the local Fair Trade Act. The suit was started under the Massachusetts Fair Trade Act, and the defenses here interposed were there set up, but over-

ruled. Plaintiff was granted an injunction. The Massachusetts court held that Remington was not doing business within that state and had a right to use the facilities of the Massachusetts courts. Significantly, however, the court said, at p. 138, that its findings were based upon earlier decisions and that it had not been asked to reconsider those in the light of subsequent United States Supreme Court decisions broadening the scope of local regulations dealing with foreign corporations. It would appear, therefore, that, if this precise point had been argued, the result might have been different.

Applying the tests set forth in the cited authorities to the undisputed evidence disclosed by the affidavits, the conclusion is inescapable that the plaintiff was in fact doing business in this state at the time of the acts complained of and was required to, but did not, comply with the provisions of the Corporation Act.

II.

Plaintiff contends that it is excepted from any requirement to comply with foreign corporation provisions of our Corporation Act because it is engaged entirely in interstate commerce, and that it is unlawful for any state to impose such regulations upon interstate commerce as will constitute a burden thereon.

[fol. 45] Not all state regulations affecting foreign corporations constitute a burden upon interstate commerce, thereby rendering them unconstitutional. *General Electric Co. v. Packard Bamberger & Co.*, 14 N. J. 209, 221 (1953). The regulation is only unlawful if it materially restricts the free flow of commerce across state lines. In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. ed. 1915, 1925 (1945), the court said:

“ * * * There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.”

Plaintiff relies heavily for support of its argument on *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678 (1910). There, the court struck down a Kansas statute requiring a foreign corporation to secure a certificate to do business as a condition precedent to instituting suit. A comparison of the Kansas statute with ours will show that the requirements of that statute were much more onerous than those in our statute. It is interesting to note, also, that the court did not specifically pass upon the requirement that the corporation have a certificate before instituting suit, but held that, since this section of the statute was so connected with the other sections held unconstitutional as to be inseparable, it, too, had to fall. The court went on to say, at page 687:

“ * * * How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect [fol. 46] of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. * * * ”

This case was followed by our former Supreme Court in *Federal Schools, Inc. v. Sidden*, 14 N. J. Misc. 892 (1936), but the decision in that case rested not upon any alleged illegal interference with interstate commerce, but upon the fact that the contract sued upon, being one made outside of New Jersey, was not interdicted by the provisions of then Section 98 of the Corporation Act (now N. J. S. 14:15-4).

The trend and philosophy of the more recent cases has been in favor of upholding, rather than striking down, reasonable state regulations of foreign corporations. This is illustrated by the very recent case of *Portland Cement Co. v. Minnesota*, 3 L. ed. 2d 421, 79 S. Ct. (1959), in upholding a state income tax imposed upon a foreign corporation. In sustaining the right of a state to exact an income tax from a foreign corporation upon that portion of its profits derived from activities within the state, the court said, at page 429:

“ * * * While it is true that a State may not erect a wall around its borders preventing commerce an

entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. * * *."

As early as 1908, the Supreme Court, in *Galveston, H. & S. A. R. Co. v. Texas*, 52 L. ed. 1031, 210 U. S. 217 (1908), said:

[fol. 47] "It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. * * *."

If the levying of an income tax on the business of a foreign corporation which is generated within a state is not a burden upon interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden upon interstate commerce?

It must also be borne in mind that the cause of action here sued upon arises only because of the provisions of our Fair Trade Act. Such contract as the plaintiff relies upon would be illegal except for the provisions of that statute. *General Electric Co. v. Packard Bamberger & Co.*, *supra*. Can it be said that there is anything unfair about requiring a foreign corporation, which seeks to take advantage of a cause of action given it by one of our laws, to comply with the provisions of the other as a condition to taking advantage of the other statute? To pose the question is to suggest the answer.

In the *General Electric Co.* case, the court said that, although the power of Congress over interstate commerce may be exclusive as to a direct statutory regulation of interstate commerce as such, the states are authorized under pertinent decisions of the United States Supreme Court (citing cases) to enact regulations which affect all business done in the state, if such regulations are reasonable and not burdensome to interstate commerce. The simple require-

ments of our Corporation Act are reasonable and cannot be [fol. 48] called burdensome. To hold that these regulations constitute such a burden upon interstate commerce as to exempt the plaintiff from the provisions thereof is to indulge in an unwarranted legalism.

The cases of *Seagram Distillers Company v. Corenswert*, 281 S. W. 2d 657 (Sup. Ct., Tenn. 1955); *State v. Ford Motor Co.*, 38 S. E. 2d 242 (Sup. Ct., S. C. 1946); *Bulova Watch Co. v. Anderson*, 70 N. W. 2d 243 (Sup. Ct., Wis. 1955), cited by plaintiff in support of its position, have been examined, and the holdings there do not require any change in the result here reached.

III.

Finally, it is argued that the provisions of N. J. S. 14:15-4 do not apply because that section precludes the maintaining of an action in this state only "upon any contract made by it (the foreign corporation) in this state." Admittedly, the 1500 contracts made by plaintiff with its retailers are Indiana contracts, since they were subject to acceptance there, and it is said that the orders received for plaintiff's products are likewise subject to acceptance in Indiana.

That this statute is ordinarily limited to contracts made in this state has been held in several cases. *Federal Schools, Inc. v. Sidden*, *supra* (and the numerous cases therein cited); *Protective Finance Corp. v. Glass*, 100 N. J. L. 85 (Sup. Ct. 1924); *Lehigh, &c., Co. v. Atlantic S. & R. Works*, *supra*. None of these cases was a suit upon a cause of action arising only out of one of our statutes. Also, this argument does not take into consideration the provisions of N. J. S. 14:15-5 (sometimes referred to as a "mutual spite" or "retaliatory" statute). Most states, including, as above noted, Indiana, have such statutes.

[fol. 49] The Indiana statute bars suits arising out of contract, as well as tort, whether such actions are at law or in equity. Plaintiff argues that its action is one in tort and therefore not precluded by the Corporation Act. It would seem, however, that the action is one on contract because, while the defendant is a non-signer of a fair trade contract, it is liable under the statute since other persons have

signed such contracts. Non-signers have been held to be bound to the same degree as signers. See *Old Dearborn D. Co. v. Seagram-Distil. Corp.*, 299 U. S. 483, 81 L. ed. 109 (1936); *Lionel Corp. v. Grayson-Robinson Stores*, *supra*.

Quare: Under these circumstances, is not the relationship of the plaintiff and defendant one of a contract made in the State of New Jersey, created by the Fair Trade Act as a result of the signing of other contracts by persons in New Jersey?

N. J. S. 14:15-5 was discussed in *Ex-Cell-o Corp. v. Farmers Coop. Dairies Ass'n.*, 28 N. J. Super. 159 (App. Div. 1953), but its provisions were not applied because the defense was first raised on appeal, and not below. That opinion indicates—without stating reasons—that this may be a disfavored defense. But, when timely raised, as here, it should not be so considered. No valid reason is given by plaintiff why the provisions of the statute should not be applied, except the argument concerning interstate commerce heretofore disposed of. In *Babe Kaufman Music Corp. v. Mandia*, 127 N. J. Eq. 480 (Ch. 1940), this defense was interposed and the court, after reviewing the retaliatory provisions of the New York Corporation Law—the plaintiff being a corporation of New York—refused to enforce the contract.

While it is clear that the provisions of N. J. S. 14:15-4 apply, and that the relationship between plaintiff and defendant is based upon a contract made in this state by [fol. 50] virtue of the Fair Trade Act, it is also clear that the provisions of N. J. S. 14:15-5 are applicable and, based upon the retaliatory provisions of the Indiana statute, the plaintiff's suit is barred. The plaintiff's application for an interlocutory injunction, therefore, is denied.

Since the affidavits disclose palpably that there is no genuine issue as to any material fact, the defendant is entitled to a summary judgment dismissing the complaint, with costs. R. R. 4:58-3; *Frank Rizzo, Inc. v. Alatsas*, 27 N. J. 400, 405 (1958).

A judgment may be presented in accordance with these conclusions.

[fol. 51]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTYFINAL JUDGMENT DISMISSING COMPLAINT—Filed
October 1, 1959 at 1:55 p. m.

This matter having been opened to the Court on Friday, August 21, 1959 by Lum, Fairlie & Foster, Attorneys for Defendant (William F. Tompkins and Warren E. Dunn appearing) in the presence of Lorentz & Stamler, Attorneys for Plaintiff (Melvin P. Antell appearing) and in the presence of Casey, Lane & Mittendorf of the New York Bar, of Counsel to the Defendant (Roger Lloyd and Klaus Motulsky appearing), upon Defendant's motion to dismiss the complaint, and the Court having considered all of the pleadings, affidavits, exhibits and proofs, and the Court having further considered the argument of counsel thereon, and the Court having rendered a written opinion on September 29th, 1959, for the reasons therein stated,

It is on this 1st day of October, 1959,

Ordered and adjudged that the Complaint be and the same hereby is dismissed, with costs to the defendant.

Everett M. Scherer, J. S. C.

We hereby consent to the form of the foregoing order.

Lorentz & Stamler, Attorneys for Plaintiff, By
Melvin P. Antell, A. Partner.

[fol. 52]

IN THE SUPERIOR COURT OF NEW JERSEY
UNION COUNTY

NOTICE OF APPEAL—Filed October 1, 1959 at 2 p. m.

To: Lum, Fairlie & Foster,
Attorneys for Defendant,
605 Broad Street,
Newark 2, New Jersey.

Hon. Everett M. Scherer, J. S. C.,
Hall of Records, High Street,
Newark, New Jersey.

Sirs:

Please take notice that plaintiff, Eli Lilly and Company hereby appeals to the Appellate Division of the Superior Court from the Final Judgment of the Chancery Division, entered in the above entitled matter dismissing the Complaint filed herein on October 1, 1959.

Lorentz & Stamler, Attorneys for Plaintiff, By
Melvin P. Antell, A Member of the Firm.

Dated: October 1, 1959.

[fol. 53]

SUPREME COURT OF NEW JERSEY

No. 3139—September Term

Civil Action

On Certification

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, Inc., a corporation of the State of
New Jersey, Defendant-Respondent.

ORDER ON CERTIFICATION—December 21, 1959

Pursuant to Rule 1:10-1 it is Ordered that the appeal from the judgment entered in this cause on October 1, 1959, in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-70-59), be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

Ordered that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

Ordered that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the entry of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

Dated December 21, 1959.

By the Court

Joseph Weintraub, Chief Justice.

[fol. 54]

SUPREME COURT OF NEW JERSEY

CHECK LIST

No. A-85—September Term, 1959

On appeal from Chancery Division, Superior Court

ELI LILLY AND COMPANY, Plaintiff-Appellant,
and

SAV-ON-DRUGS, Inc., Defendant-Respondent.

Decided March 7, 1960.

The Chief Justice presiding.

Opinion by Below.

	Affirm	Reverse
The Chief Justice	1	
Mr. Justice Burling	1	
" " Jacobs	1	
" " Francis	1	
" " Proctor	1	
" " Hall		1
" " Schettino	1	
Totals	6	1

[fol. 55]

SUPREME COURT OF NEW JERSEY

No. A85—September Term 1959

**ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,**

vs.

**SAV-ON-DRUGS, Inc., a corporation of the State of
New Jersey, Defendant-Respondent.**

Argued February 22, 1960

On appeal from a judgment of the Superior Court, Chancery Division, whose opinion is reported at 57 N. J. Super. 291.

Mr. Melvin P. Antell argued the cause for the appellant (Messrs. Lorentz & Stamler, attorneys).

Mr. Warren E. Dunn argued the cause for the defendant-respondent (Messrs. Lum, Fairlie & Foster, attorneys; Mr. Claus Motulsky, of the New York bar, on the brief).

Mr. Murry Brochin argued the cause for the State of New Jersey, intervenor (Mr. David D. Furman, attorney).

OPINION—March 7, 1960

Per Curiam

The judgment is affirmed for the reasons expressed in the opinion of Judge Scherer in the Court below.

[fol. 56]

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3139

Civil Action

On Appeal

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, Inc., a corporation of the State of
New Jersey, Defendant-Respondent.

MANDATE ON AFFIRMANCE—March 7, 1960

This cause having been duly argued before this Court by Mr. Melvin P. Antell, counsel for the appellant and Mr. Warren E. Dunn, counsel for the respondent, and Mr. Murry Brochin, counsel for the State of New Jersey, intervenor, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the seventh day of March, 1960.

John H. Gildea, Clerk of the Supreme Court.

[fol. 57]

SUPREME COURT OF NEW JERSEY

No. A85—September Term, 1959

Civil Action

ELI LILLY AND COMPANY, a corporation of the
State of Indiana, Plaintiff-Appellant,

—vs.—

SAV-ON-DRUGS, INC., a corporation of the State of
New Jersey, Defendant-Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Dated April 22, 1960

I. Notice is hereby given that Eli Lilly and Company, the appellant above-named, appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of New Jersey affirming the dismissal of the complaint filed by plaintiff, which said final judgment was entered in this action on March 7, 1960.

This appeal is taken pursuant to 28 U. S. C. Section 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include therein the following:

Page of Appendix

Complaint	1a
Exhibit A—Contract	15a
Exhibit E—Letter of November 5, 1958	16a
Exhibit F—Letter of March 30, 1959	17a
Affidavit of Louis V. Clemente	19a
Notice of Motion for Interlocutory Injunction	20a
Affidavit of Richard L. Bonello	21a
Affidavit of Warren E. Dunn	22a
Order Denying Interlocutory Injunction	24a

Notice of Motion	26a
Affidavit of Samuel J. Sirota	27a
Affidavit of James P. Herring	28a
Affidavit of R. O. Clitter	31a
Affidavit of Leonard L. Audino	33a
Opinion of Superior Court, Chancery Division	35a
Final Judgment Dismissing Complaint	51a
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Opinion of Supreme Court of New Jersey on Affirmance	
Mandate on Affirmance	

[fol. 58] III. The following question is presented by this appeal:

Is a state statute repugnant to the Commerce Clause (Article 1, Section 8) of the United States Constitution when applied to deny to a foreign corporation the right to engage in interstate commerce in the state, and to deny it access to the courts of the state, unless and until it obtains from the state a certificate of authority and subjects itself to all the requirements and obligations incident to domestication?

Lorentz and Stamler, Attorneys for Eli Lilly and Company, Appellant, 11 Commerce Street, Newark 2, N. J., By Joseph H. Stamler, A Member of the Firm.

Of Counsel: Everett L. Willis, Esq., Dewey, Ballantine, Bushby, Palmer & Wood, Esqs., 40 Wall Street, New York City, New York.

Dated: April 22, 1960.

[fol. 59]

SUPREME COURT OF NEW JERSEY
No. A85—September Term, 1959

[Title omitted]

CROSS-DESIGNATION OF RECORD ON APPEAL—Filed
May 16, 1960

The Clerk will please include, when preparing a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, the following which is hereby designated by the Defendant-Respondent as an additional portion of the record that Defendant-Respondent desires be included on the record herein to be certified to the United States Supreme Court:

Exhibit D-1 introduced in evidence on August 11, 1959 (Certificate of New Jersey Secretary of State that on August 10, 1959 Eli Lilly and Company was not authorized to transact business in New Jersey as a foreign corporation).

Lum, Fairlie & Foster, By Joseph J. Biunno, a Partner, Attorneys for Defendant-Respondent, 605 Broad Street, Newark 2, New Jersey.

Of Counsel: Casey, Lane & Mittendorf, 26 Broadway, New York 4, New York.

[fol. 60]

EXHIBIT "D-1"

STATE OF NEW JERSEY

[Emblem]

DEPARTMENT OF STATE

I, EDWARD J. PATTEN, Secretary of State of the State of New Jersey, Do HEREBY CERTIFY that so far as the records show this office has no record of a corporation entitled ELI-LILLY AND COMPANY nor is it a foreign corporation authorized to transact business in this State.

[Seal]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at Trenton, this Tenth day of August A.D. 1959.

EDWARD J. PATTEN
Secretary of State.

[fol. 61] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 62] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 63]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER-NOTING PROBABLE JURISDICTION—October 17, 1960

Appeal From the Supreme Court of the State of New Jersey.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

October 17, 1960

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959.

No. 2338

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

JOSEPH H. STAMLER,
MELVIN P. ANTELL,

11 Commerce Street,
Newark 2, New Jersey,

LORENTZ & STAMLER,
Of Counsel.

EVERETT I. WILLIS,
40 Wall Street,
New York 5, New York,
*Attorneys for Eli Lilly and
Company, Appellant.*

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD,
Of Counsel.

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CASES CITED

<i>Buck Stove Co. v. Vickers</i> , 226 U. S. 205 (1912)	7, 10
<i>Bulova Watch Co. v. Anderson</i> , 270 Wis. 21, 70 N. W. 2d 243 (1955)	9, 14
<i>Castle v. Hayes Freight Lines, Inc.</i> , 348 U. S. 61 (1954)	15
<i>Chambers v. Baltimore & Ohio R. R.</i> , 207 U. S. 142 (1907)	13

<i>Chicago v. Atchison, Topeka and Santa Fe Ry.</i> , 357	
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<i>Dahnke-Walker Milling Company v. Bondurant</i> , 257	
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<i>General Ry. Signal Co. v. Virginia</i> , 246 U. S.	
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<i>Groel v. United Electric Co.</i> , 69 N. J. Eq. 397, 60	
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<i>Hill v. Florida</i> , 325 U. S. 538 (1945)	15
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<i>James Stewart & Co. v. Sadrakula</i> , 309 U. S. 94	
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<i>Johnson & Johnson v. Narragansett Wiping Supply</i>	
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<i>McGee v. International Life Ins. Co.</i> , 355 U. S. 220	
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<i>Northwestern States Portland Cement Co. v. Minnesota</i> , 358 U. S. 450 (1959)	12, 18
<i>Paul v. Virginia</i> , 8 Wall. 168 (U. S. 1868)	11
<i>Railway Express Co. v. Virginia</i> , 282 U. S. 440 (1931)	11
<i>Remington Arms v. Lechmere Tire & Sales Co.</i> , — Mass. —, 158 N. E. 2d 134 (1959)	9, 14
<i>Ronson Corp. v. Macher Jewelry & Watch Corp.</i> , 1955 CCH Trade Cases, par. 68,193 (N. Y. Sup. Ct. N. Y. Co. 1955)	9
<i>Scripto, Inc. v. Carson</i> , 362 U. S. 207 (1960)	12
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<i>State v. Ford Motor Co.</i> , 208 S. C. 379, 38 S. E. 2d 242 (1946)	9, 17
<i>Sunbeam Corp. v. Grayson-Robinson Stores, Inc.</i> , 1953 CCH Trade Cases, par. 67,499 (Super. Ct. Cal. 1953)	9
<i>Tauza v. Susquehanna Coal Co.</i> , 220 N. Y. 259, 115 N. E. 915 (1917)	16
<i>Union Brokerage Co. v. Jensen</i> , 322 U. S. 202 (1944)	11
<i>Weco Products Co. v. G. E. M. Inc.</i> , 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. of Minn. 1960)	9
<i>Western Union Tel. Co. v. Massachusetts</i> , 125 U. S. 530 (1888)	14, 15, 18

NOTE: The following additional cases are cited in a footnote on pages 8 and 9 to show the unanimity of states other than New Jersey on the question here involved:

Abner Mfg. Co. v. McLaughlin, 41 N. M. 97, 64 P. 2d 387 (1937)

Advance-Rumely Thresher Co. v. Stohl, 75 Utah 124, 283 Pac. 731 (1929)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1959.

No.

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

Appellant appeals from a judgment of the Supreme Court of New Jersey entered on March 7, 1960 and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented under the Constitution of the United States.

Opinions Below.

The opinion of the Supreme Court of New Jersey is reported in 31 N. J. 591, 158 A. 2d 528. The opinion of the Superior Court of New Jersey, Chancery Division, is reported in 57 N. J. Super. 291, 154 A. 2d 650. Copies of the opinions and judgments of both courts are appended hereto as Appendix A, B, C and D.

Jurisdiction.

This suit was brought by appellant in the Superior Court of New Jersey, Chancery Division, for an injunction against appellee under the New Jersey Fair Trade Act, N. J. Rev. Stat. 56:4-3, et seq. The judgment of that court dismissing the complaint was affirmed by the Supreme Court of New Jersey, and judgment entered, on March 7, 1960. Notice of Appeal was filed in the Supreme Court of New Jersey on May 2, 1960.

Jurisdiction of the appeal is conferred by 28 U. S. C. § 1257(2) since there is drawn in question the validity of a New Jersey statute under the Commerce Clause of the United States Constitution and the decision below was in favor of its validity. *Dahnke-Walker Milling Co. v. Bon-durant*, 257 U. S. 282 (1921); *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265 (1921); *Fiske v. Kansas*, 274 U. S. 380 (1927); *James Stewart & Co. v. Sadrakula*, 309 U. S. 94 (1940); *Standard Oil Co. v. Johnson*, 316 U. S. 481 (1942).

Statutes Involved.

Sections 14:15-3, 4, 5, and 6 of the New Jersey Revised Statutes are set forth in Appendix E hereto.

Question Presented.

Is a state statute repugnant to the Commerce Clause (Article I, Section 8) of the Constitution of the United States when applied to deny to a foreign corporation the right to engage in interstate commerce in the state, and to deny it access to the courts of the state, unless and until it obtains from the state a certificate of authority and subjects itself to all the requirements and obligations incident to domestication?

Statement.

Appellant is an Indiana corporation, engaged in the business of manufacturing and selling pharmaceutical products. Its products are manufactured in Indiana and distributed throughout the United States and in foreign countries. As found by the trial court, appellant does not sell its products to the local retail trade, but only in interstate commerce to wholesale distributors which, in turn, sell to retail dealers (Opinion, Appendix C, p. 23).

All of appellant's products sold to New Jersey wholesalers are shipped directly from Indiana, pursuant to contracts made in Indiana, and appellant maintains no warehouse or stock of goods in New Jersey. Appellant's activities in New Jersey are limited to the work of eighteen

detail men, a supervisor and his secretary. These detail men do not solicit or take orders but merely visit New Jersey pharmacists, physicians and hospital personnel to acquaint them with appellant's products. Their supervisor leases an office in Newark for which he is reimbursed by appellant. Appellant's name appears on the door of this office and in the telephone directory, but appellant owns no property in the state and does not enter into contracts in New Jersey. In fact, appellant maintains no contacts with New Jersey beyond those incidental to its business in interstate commerce.

As part of its national program of promoting its trademarks and name and maintaining the good will incident thereto, appellant entered into contracts in the state of Indiana with a number of New Jersey drug retailers pursuant to which the retailers agreed not to resell appellant's products at less than the prices established by appellant. Thereupon, under the New Jersey Fair Trade Act, N. J. Rev. Stat. 56:4-3, et seq., and the Maguire Act, 15 U. S. C. § 1, the prices so established became obligatory upon non-signing retailers having notice of such contracts as well as those who had signed the contracts. Where necessary, appellant over the years has sought injunctive relief against retailers who have wilfully violated appellant's lawfully established prices. In New Jersey alone the state courts have issued more than 30 injunctions in suits brought by appellant against such retailers.

This suit was begun on July 3, 1959, against appellee, Sav-On-Drugs, Inc., a drug retailer, to enjoin sales by appellee of appellant's trademarked products at less than appellant's established minimum resale prices. Appellee moved for a summary judgment dismissing the complaint

on the ground that appellant was a foreign corporation transacting business in New Jersey without first having received a certificate of authority to do so from the secretary of state in accordance with N. J. Rev. Stat. 14:15-3.

In opposition to the motion for summary judgment appellant contended in its brief and oral argument, that these provisions do not apply to appellant because its business in New Jersey is entirely in interstate commerce and that to apply the statute to appellant "is forbidden by the commerce clause of the Federal Constitution" (Opinion, Appendix C, p. 28).

While conceding that appellant's business was entirely in interstate commerce (Opinion, Appendix C, p. 23), the trial court nevertheless ruled that appellant was required to obtain a certificate of authority from the secretary of state as a condition to maintaining the present action. On the constitutional question the court held that the application of the New Jersey statute to bar appellant's suit was not unconstitutional under the Commerce Clause of the United States Constitution despite the interstate character of appellant's business.

On appeal to the Supreme Court of New Jersey, appellant raised the same constitutional objection in its brief and oral argument.* The Supreme Court affirmed the judgment below, one justice dissenting, resting its decision on the opinion of the trial court. Judgment was entered on March 7, 1960, and it is from this judgment that appellant appeals.

* Pursuant to New Jersey court rules, the Attorney General of the state intervened on appeal to defend the constitutionality of the statute.

The Questions Are Substantial.

This is an appeal under 28 U. S. C. § 1257(2) from a final judgment of the highest court of New Jersey where is drawn in question the validity of a New Jersey statute on the ground of its repugnance to the Commerce Clause (Article I, Section 8) of the United States Constitution, the decision below being in favor of its validity. The federal constitutional question was timely raised in the court of first instance, the Superior Court of New Jersey, which upheld the validity of the New Jersey statute as applied to appellant. This ruling was necessary to the decision, there being no independent state ground upon which the decision rested. The same constitutional question was raised on appeal to the New Jersey Supreme Court which ruled on it in the same manner, resting its decision on the opinion of the lower court.

It is beyond dispute that this Court's appellate jurisdiction is properly invoked under 28 U. S. C. § 1257(2), where, as here, the objection is that the state statute is unconstitutional as applied to the person challenging the statute.* *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921); *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265 (1921); *Fiske v. Kansas*, 274 U. S. 380 (1927); *James Stewart & Co. v. Sadrakula*, 309 U. S. 94 (1940); *Standard Oil Co. v. Johnson*, 316 U. S. 481 (1942).

The constitutional question presented is a substantial one and is of major importance to every business corporation engaged in interstate commerce in the United States. The ruling of the New Jersey courts on this ques-

* Appellant does not question, of course, the constitutionality of the statute as applied to foreign corporations engaged in intra-state commerce in New Jersey.

tion was clearly erroneous, being in direct conflict with several long-standing decisions of this court holding that the Commerce Clause of the United States Constitution forbids the application of state qualification statutes to foreign corporations engaged in interstate commerce. *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921); *Furst v. Brewster*, 282 U. S. 493 (1931). The court below departed from this clear constitutional doctrine on the ground, demonstrably wrong, that the "trend and philosophy of the more recent cases" of this Court indicate that the doctrine is no longer valid (Opinion, Appendix C p. 34).

We are thus confronted with the unusual action of a state court presuming to disregard decisions of this Court which rest on a fundamental interpretation of the Commerce Clause. The principle is so clear that it has become a textbook rule. 23 AM. JUR. 248; 17 FLETCHER, CORPORATIONS 263, 504 (rev. vol. 1960). New Jersey, according to our research, stands alone in holding that this type of legislation can be applied to foreign corporations in interstate commerce. The constitutional doctrine established by this Court has been adhered to by every other state which has spoken on the subject either by statute* or

- * Alaska—Business Corporation Act §§ 99, 117
- California—General Corporation Law § 6403
- Delaware—Code, tit. 8, §§ 341, 343, 344 (1953)
- Hawaii—Rev. Laws § 174-1 (1955)
- Iowa—Law ch. 321 § 494 (1959)
- Maine—Rev. Stat. ch. 53, § 127 (1954)
- Maryland—Ann. Code art. 23, §§ 88, 90, 91 (1957)
- North Carolina—Gen. Stat. § 55-131
- North Dakota—Rev. Code Supp. § 10-2201 (1957)
- Oregon—Rev. Stat. § 57.655 (1953)
- Tennessee—Code Ann. §§ 48-901, 48-902 (1956)
- Texas—Laws Ch. 64, art. 8.01 (1955)

by judicial decision.*

- Alabama—*Hurst v. Fitz Water Wheel Co.*, 197 Ala. 10, 72 So. 314 (1916)
- Arizona—*Weber Showcase & Fixture Co. v. Co-Ed Shop*, 47 Ariz. 415, 56 P. 2d 667 (1936)
- Arkansas—*Sillin v. Hessig-Ellis Drug Co.*, 181 Ark. 386, 26 S. W. 2d 122 (1930)
- Colorado—*Herman Bros. Co. v. Nasiacos*, 46 Colo. 208, 103 Pac. 301 (1909)
- Florida—*Blackshear Mfg. Co. v. Sorey*, 97 Fla. 437, 121 So. 103 (1929)
- Georgia—*Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S. E. 120 (1923)
- Idaho—*New Idea Spreader Co. v. Satterfield*, 45 Idaho 753, 265 Pac. 664 (1928)
- Illinois—*Lehigh Portland Cement Co. v. McLean*, 245 Ill. 326, 92 N. E. 248 (1910)
- Indiana—*Vilter Mfg. Co. v. Evans*, 86 Ind. App. 144, 154 N. E. 677 (1927)
- Kentucky—*Webb v. Knoxville Glass Co.*, 217 Ky. 225, 289 S. W. 260 (1926)
- Louisiana—*Reynold Metals Co. v. T. L. James & Co.*, 69 So. 2d 630 (Ct. App. La. 1954)
- Maine—*F. S. Royster Guano Co. v. Cole*, 115 Me. 387, 99 Atl. 33 (1916)
- Massachusetts—*Remington Arms Co. v. Lechmere Tire & Sales Co.*, — Mass. —, 158 N. E. 2d 134 (1959)
- Michigan—*Cleveland Cooperage Co. v. Detroit Milling Co.*, 235 Mich. 57, 209 N. W. 144 (1926)
- Minnesota—*Weco Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. of Minn. 1960)
- Mississippi—*Smith v. J. P. Seeburg Corp.*, 192 Miss. 563, 6 So. 2d 591 (1942)
- Missouri—*Superior Concrete Accessories, Inc. v. Kemper*, 284 S. W. 2d 482 (Sup. Ct. Mo. 1955)
- New Hampshire—*Pennsylvania Rubber Co. v. Brown*, 83 N. H. 336, 143 Atl. 703 (1928)
- New Mexico—*Abner Mfg. Co. v. McLaughlin*, 41 N. M. 97, 64 P. 2d 387 (1937)
- New York—*Brooks Transp. Co. v. Hillcrea Export & Import Co.*, 106 N. Y. S. 2d 868 (Sup. Ct. N. Y. 1951)
- Ohio—*McClarran v. Longdin-Brugger Co.*, 24 Ohio App. 434, 157 N. E. 828 (1926)
- Oklahoma—*Sooner Beverage Co. v. Heileman Brewing Co.*, 194 Okl. 252, 150 P. 2d 72 (1944)
- Rhode Island—*Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958)

Indeed, eight recent cases arising under fair trade laws, and indistinguishable from the present case, have reached a result contrary to New Jersey.* Thus the New Jersey decision creates a conflict among state court decisions on parallel facts, which alone should impel this Court to exercise its appellate jurisdiction.

It is obvious that if the judgment below is allowed to stand, the effect will be to discredit a number of precedents of this Court and to place in confusion the constitutional status of state qualification statutes with respect to foreign corporations in interstate commerce. If, indeed, although appellant believes strongly to the contrary, there is ground for changing or modifying the doctrine of these cases, it seems inconceivable that the nature and extent of

South Carolina—*State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946).

South Dakota—*Wyman, Partridge Holding Co. v. Lowe*, 65 S. D. 139, 272 N. W. 181 (1937).

Utah—*Advance-Rumely Thresher Co. v. Stohl*, 75 Utah 124, 283 Pac. 731 (1929).

Washington—*Procter & Gamble Co. v. King County*, 9 Wash. 2d 655, 115 P. 2d 962 (1941).

West Virginia—*United Shoe Repairing Mach. Co. v. Carney*, 116 W. Va. 224, 179 S. E. 813 (1935).

Wisconsin—*Minneapolis Securities Corp. v. Silvera*, 254 Wis. 129, 35 N. W. 2d 322 (1948).

Wyoming—*Creamery Package Mfg. Co. v. Cheyenne Ice Cream Co.*, 55 Wyo. 277, 100 P. 2d 116 (1940).

* *Remington Arms v. Lechmere Tire & Sales Co.*, —Mass.—, 158 N. E. 2d 134 (1959); *Weco Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. of Minn. 1960); *Seagram Distillers Co. v. Corenswet*, 198 Tenn. 644, 281 S. W. 2d 657 (1955); *Fromm & Sichel, Inc. v. Zimmerman*, 1956 CCH Trade Cases, par. 68,362 (D. Ill. 1956); *Ronson Corp. v. Macher Jewelry & Watch Corp.*, 1955 CCH Trade Cases, par. 68,193 (N. Y. Sup. Ct. N. Y. Co. 1955); *Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958); *Bulova Watch Co. v. Anderson*, 270 Wis. 21, 70 N. W. 2d, 243 (1955); *Sunbeam Corp. v. Grayson-Robinson Stores, Inc.*, 1953 CCH Trade Cases, par. 67,499 (Super. Ct. Cal. 1953).

such change should be allowed to be defined by a state court of first instance.

Consequently, whether or not the decision below should ultimately be upheld, the question here is substantial and merits review. Since that decision runs counter to a constitutional doctrine which has been accepted for many years and which should be reaffirmed, the necessity for noting jurisdiction here is even stronger. Indeed, if summary action is justified at all in this case, it would be on the side of a summary reversal on the basis of decisions of this Court which are squarely in point.

1. The constitutional rule applicable to this case is that a foreign corporation cannot be required to obtain authority from a state to transact interstate business in the state and cannot be barred from bringing suit in the state for failure to obtain such authority. This rule was established and reaffirmed in the following cases: *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921); *Furst v. Brewster*, 282 U. S. 493 (1931). In each of these cases this Court held that a foreign corporation which was not qualified under a state domestication statute, such as is involved in this case, could not be barred from suing in the courts of the state since its activities in the state were in interstate commerce.*

* Although all these cases were cited by appellant in the court below, the only one even mentioned by the court was the *Pigg* case which it sought to distinguish on the basis of the particular Kansas qualification statute involved. The court's attempted distinction is not only far-fetched on its face but ignores the fact that cases subsequent to *Pigg*, dealing with a variety of statutes, have made it clear that the constitutional principle applies to any qualification statute regardless of its particular provisions.

The principle upon which these decisions were based had been established in *Crutcher v. Kentucky*, 141 U. S. 47, 57 (1891), where the Court said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

Thus, in *Crutcher* this Court carved out an important exception to the earlier rule that a state could exclude a foreign corporation entirely from its limits or admit it only upon conditions. *Paul v. Virginia*, 8 Wall. 168 (U. S. 1868). The rule of the *Paul* case still applies to foreign corporations as regards intrastate commerce in which they engage within a state, even if such intrastate business is done by a corporation which is also engaged in interstate commerce. See, e. g., *Railway Express Co. v. Virginia*, 282 U. S. 440 (1931); *General Ry. Signal Co. v. Virginia*, 246 U. S. 500 (1918). Such corporations are of course required to comply with state qualification statutes.*

The rule that the privilege of engaging in interstate commerce is not one conferred by the states is a bedrock

* See *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944) where a qualification statute was upheld as applied to a foreign corporation doing a "localized" customs brokerage business. The corporation there was not itself involved in commerce across state lines, and the court distinguished *International Textbook Co. v. Pigg*, *supra*, and *Dahnke-Walker v. Bondurant*, *supra*, as involving foreign corporations which came into the state to "contribute to or to conclude a unitary interstate transaction." 322 U. S. at 211. So too the New Jersey activities of the appellant here merely contribute to its unitary interstate business.

constitutional doctrine of this Court. In the field of state taxation it underlies the rule that a state may not tax the privilege of engaging in interstate commerce. This rule was reaffirmed in *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951) and in recent months was twice recognized as being "beyond dispute" in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 458 (1959), and in *Scripto, Inc. v. Carson*, 362 U. S. 207, 212 (1960).

It is therefore ironic, and illustrative of the error below, that *Portland Cement* was the only case cited by the trial court in support of its assertion that the "trend and philosophy of the more recent cases" justified its failure to follow the rule of the *Pigg* case.

The error of the New Jersey Court evidently stems from its failure to recognize the important distinction between state health, safety, or economic legislation incidentally affecting interstate commerce and legislation asserting state power over the federal privilege of engaging in interstate commerce. See *Sioux Remedy Co. v. Cope*, *supra* at 201; *Crutcher v. Kentucky*, *supra* at 60-61. The importance of this distinction was recently stressed by this Court in *Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U. S. 77 (1958). There this Court denied to the City of Chicago the power to license connecting motor vehicle service between railroad terminals, an integral part of interstate transportation authorized by federal legislation, while recognizing that the city could regulate the operation of the vehicles and subject them to traffic and safety laws. (See 357 U. S. at 88.) So too, appellant, of course, does not claim immunity from state police regulation, but merely asserts that its right to carry on interstate commerce in New Jersey is not subject to "leave from local authorities." (*Id.* at 87).

Unlike other Commerce Clause cases which have so often divided this Court in the past, *e. g.*, *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927) (Holmes, Brandeis & Stone, JJ., dissenting), the question involved in this case has not produced substantial disagreement or dissent in this Court. Four of the five principal cases relied on by appellant were unanimous decisions on the constitutional issue here involved, and the most recent one, *Furst v. Brewster, supra*, was not only unanimous but the opinion was written by Chief Justice Hughes and the Court included Justices Holmes, Brandeis, and Stone, none of whom could be thought insensitive to the valid claims of state legislation. Their adherence, with a unanimous Court, to the doctrine that a state may not trammel the federal privilege of engaging in interstate commerce demonstrates the soundness of the doctrine and the need for recognizing its continued vitality.

2. The most objectionable feature of the New Jersey statute, and the one directly in issue here, is the sanction imposed for failure to obtain a certificate of authority—denial of access to the courts of the state. Any deprivation of access to the courts is always to be severely scrutinized, since, as this Court stated in *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, 148 (1907):

“The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”

Such a sanction, applied to foreign corporations engaged in interstate commerce, obviously interferes with that commerce since it prevents enforcement of obligations arising from interstate commerce. *Sioux Remedy Co. v.*

Cope, 235 U. S. 197 (1914); *Furst v. Brewster*, 282 U. S. 493 (1931).

In both these cases, the Court stated the governing principle in categorical terms: A corporation has a constitutional right to come into a state for "all the legitimate purposes" of interstate commerce, including "all the component parts of commercial intercourse between different States," and access to the courts in furtherance of that commerce cannot be denied. 235 U. S. at 203-204; 282 U. S. at 498. That principle clearly applies here; appellant's protection of its trademarks and brand name through fair trade pricing, and court enforcement thereof, is an integral part of its interstate operation. *Remington Arms v. Lechmere Tire & Sales Co.*, — Mass. —, 158 N. E. 2d 134 (1959); *Bulova Watch Co. v. Anderson*, 270 Wis. 21, 70 N. W. 2d 243 (1955).

That the cause of action sued on here was created by the state is without significance. The suits in *Sioux* and *Furst* were also based on state-created causes of action—to enforce contracts made within the state—yet in both cases the Court held that the state could not constitutionally make qualification a condition of suit. Nor can the provisions of the qualification statute be defended as a regulation of court procedure since, as this Court stated in *Sioux* (235 U. S. at 205) they "have no natural or reasonable relation to the right to sue which they are intended to restrict."

As has been shown, the basic power to require qualification under the New Jersey statute is constitutionally lacking in this case, but even were it otherwise, the no-suit sanction would contravene the Commerce Clause. This Court more than once has held that, regardless of the validity or invalidity of the underlying regulation, enforcement by any sanction interfering with interstate commerce is forbidden. *Western Union Tel. Co. v. Massachusetts*,

125 U. S. 530 (1888); *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954); see also *Hill v. Florida*, 325 U. S. 538, 543 (1945).

3. No legitimate state interest calls for overruling at this time the line of authority ranging from the *Pigg* case to *Furst v. Brewster*. The New Jersey qualification statute, like those involved in the cited cases, was designed to assure that foreign corporations would be subject to suit in the state. When the New Jersey statute was enacted in 1896 it was thought that the theory that a corporation exists only in the state of incorporation might render a foreign corporation immune from suit without its consent. See *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905).

But this rationale of the statute has long been obsolete. In 1914 this Court held that a corporation engaged solely in interstate commerce within a state was sufficiently "present" there to be amenable to suit without its consent, express or implied. *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914). And more recent decisions, discarding the "presence" test, make clear that foreign corporations are subject to suit on the basis of minimum contacts within the state. *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957).

As a result of this development, the qualification statute is no longer necessary to carry out the purpose for which it was enacted, since the state can assert jurisdiction without exacting consent. See Note, 33 IND. L. J., 358, 376 (1958). It would therefore be ironic for this Court to permit the application of qualification statutes to corporations in interstate commerce now, when they are no longer

needed by the states to protect their citizens, after having consistently invalidated such statutes in the past.

In large part the error of the trial court is due to its failure to distinguish cases dealing with amenability to suit, such as *International Shoe* and *McGee*, from cases dealing with access to courts, such as *Pigg* and *Sioux*. In the former the constitutional question arises under the Due Process Clause of the Fourteenth Amendment and concerns the jurisdiction of state courts over foreign corporations; in the latter it arises under the Commerce Clause and relates to whether the right to engage in interstate commerce can be subjected to conditions by the states. This distinction has always led to different results on similar facts in the two types of cases. That this is no recent development can be seen by comparing the *Pigg* decision of 1910 with the *International Harvester* decision of 1914.

As pointed out earlier, New Jersey stands alone in failing to recognize the distinction between these two types of cases. For example, in *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917), the New York Court of Appeals held that a corporation doing interstate business in New York was subject to suit in New York courts although not required to qualify to do business as a foreign corporation under New York's General Corporation Law. As Judge (later Mr. Justice) Cardozo put it:

"In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here (*International Text Book Co. v. Pigg*, 217 U. S. 91)." 220 N. Y. at 267.

The highest court of South Carolina likewise held that a foreign corporation doing interstate business in South Carolina could not be subjected to a penalty for failure to qualify as a foreign corporation although the court held in the same case that the corporation was subject to the process of the state court in the state's suit to collect the penalty. *State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946).

By failing to recognize this important distinction, the court below reached the anomalous conclusion, which it strangely considered "fair," that appellant should be barred from suing appellee even though appellant unquestionably could have been sued by appellee in the courts of New Jersey.* It is difficult to believe that the court below seriously meant to imply that the "minimum contacts" which satisfy due process also enable a state to impose conditions upon the right to engage in interstate commerce. Such a rule would do no less than transfer from Congress to state legislatures the essential power over interstate commerce.

Significantly the Attorney General of New Jersey, in intervening below, did not try to justify the statute on the ground for which it was enacted—amenability to suit—but rather defended it as allegedly providing information to help the taxing authorities of New Jersey to determine what foreign corporations are engaged in activities that may be subject to taxation by the state. This pretext is indeed flimsy. Aside from the fact that this was not the purpose of the statute, but rather at best a newly-discovered

* This unjust result has been described by one law review writer in the following terms:

"You can't sue me since you didn't qualify so as to insure that I could sue you; but even though you didn't qualify I can sue you." See Note, 33 IND. L. J., 358, 370 (1958).

side effect, it suffices to point out that if the state cannot tax the privilege of engaging in interstate commerce, *Specitor Motor Service v. O'Connor, supra*, it cannot condition that privilege on giving information for tax purposes.

Further, the sanction barring access to the Courts of the state, has no rational connection with the taxing power. Cf. *Furst v. Brewster, supra* at 498; *Sioux Remedy Co. v. Cope, supra* at 205. Certainly denial or restriction of the right to engage in interstate commerce has never been held a proper method of enforcing tax laws. On the contrary this Court has specifically held that for such purposes a state is restricted to the ordinary means of collection and enforcement and cannot resort to sanctions interfering with interstate commerce. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888); and see *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 462 (1959).*

In sum, the decisions of this Court from *Pigg* to *Furst* are not only controlling here but are as soundly based today as when they were decided.

* Actually, qualification under the New Jersey Corporation Statute carries with it burdens going even beyond those apparent on the face of that statute. For example, New Jersey's Corporation Business Tax Act imposes upon a qualifying corporation a tax expressly designated as a tax "for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business *** in this State." N. J. Rev. Stat. 54:10A-2. Regulation 16:10-1.130 of the New Jersey Corporation Tax Bureau, implementing this tax statute, provides that any foreign corporation "holding a general Certificate of Authority to do business in this state issued by the Secretary of State" automatically acquires taxable status and is required to file a return and pay a tax.

Conclusion.

For fifty years the principle of the *Pigg* case has been relied upon by corporations all over the country in formulating their business policies and methods. That principle has been accepted by every state in the Union except New Jersey, and indeed by New Jersey itself until this case. *Federal Schools, Inc. v. Sidden*, 14 N. J. Misc. 892, 188 Atl. 446 (Sup. Ct. 1936). If American business were now told that the rule on which it has so long relied is being changed, and that interstate corporations large and small can now be required to comply with fifty different sets of state corporation laws, with their varying requirements as to filing of reports, payment of fees and taxes and subjection to jurisdiction, the result would be an intolerable burden on the free flow of interstate commerce.

The judgment below being clearly erroneous, and the constitutional issue substantial, probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A.

Opinion of Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY

No. A-85. SEPTEMBER TERM 1959.

ELI LILLY AND COMPANY, a corporation of the State of Indiana,
Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of New Jersey,
Defendant-Respondent.

Argued February 22, 1960. Decided March 7, 1960.

On appeal from a judgment of the Superior Court, Chancery Division, whose opinion is reported at 57 N. J. Super. 291.

MR. MELVIN P. ANTELL argued the cause for the appellant (MESSRS. LORENTZ & STAMLER, attorneys).

MR. WARREN E. DUNN argued the cause for the defendant-respondent (MESSRS. LUM, FAIRLIE & FOSTER, attorneys); MR. CLAUS MOTULSKY, of the New York bar, on the brief.

MR. MURRY BROCHIN argued the cause for the State of New Jersey, intervenor (MR. DAVID D. FURMAN, attorney).

PER CURIAM

The judgment is affirmed for the reasons expressed in the opinion of Judge Scherer in the Court below.

A true copy,

JOHN H. GILDEA,
Clerk.

APPENDIX B.

Judgment of Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3139.

ELI LILLY AND COMPANY, a corporation of the State of Indiana,

Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of New Jersey,

Defendant-Respondent.

* Civil Action.
On Appeal.
Mandate on Affirmance.

This cause having been duly argued before this Court by Mr. Melvin P. Antell, counsel for the appellant and Mr. Warren M. Dunn, counsel for the respondent, and Mr. Murry Brochin, counsel for the State of New Jersey, intervenor, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearings shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the seventh day of March, 1960.

FILED

Mar 7 1960

John H. Gildea
ClerkJOHN H. GILDEA,
Clerk of the Supreme Court.

A true copy,

JOHN H. GILDEA,
Clerk.

APPENDIX C.

**Opinion of Superior Court of New Jersey,
Chancery Division.**

(Filed September 29, 1959.)

Decided September 29, 1959.

MESSRS. LORENTZ AND STAMLER (MESSRS. JOSEPH H. STAMLER AND MELVIN P. ANTELL appearing), Attorneys for Plaintiff.**MESSRS. LUM, FAIRLIE & FOSTER** (MESSRS. WILLIAM F. TOMPKINS AND WARREN E. DUNN appearing), Attorneys for Defendant.**SCHERER, J. S. C.**

Plaintiff is a corporation of the State of Indiana not authorized to transact business in the State of New Jersey. It does not have a certificate from the Secretary of State as required by N. J. S. 14:15-4. It filed the present suit to compel the defendant to comply with minimum prices fixed for the resale of plaintiff's products, in accordance with N. J. S. 56:4-3 et seq., generally known as the Fair Trade Act. The facts are substantially undisputed and appear in the affidavits filed by both parties.

Plaintiff is one of the largest dealers of pharmaceutical products in this country, if not in the world, and its products are distributed throughout the United States and in foreign countries. Its office and principal place of business is in Indianapolis, Indiana. Plaintiff's products within the United States are sold to selected wholesale distributors and in interstate commerce. It is said that the business done in New Jersey represents 2.7% of its domestic sales. Plaintiff does not sell directly to the retail trade, but its products reach the retail trade through wholesale distributors. Plain-

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tiff says that it leases no sales office, owns no real estate, and maintains no warehouse or other place of business in this state. Its products are "fair traded" in New Jersey under the above cited statute and it claims to have approximately 1500 contracts in effect in this state signed by retailers of its products, under which these retailers agree to maintain the minimum price structure fixed by plaintiff.

Defendant is a retail drug company with stores in Plainfield and Carteret. Defendant did not sign any contract, but it admits having notice of the fact that plaintiff has fair trade contracts in force and that it is, therefore, bound by the provisions of the Fair Trade Act, unless its other defenses are sustained. Even though a non-signer, defendant must maintain plaintiff's minimum price structure. *N. J. S. 56:4-6; Lionel Corp. v. Grayson-Robin & Stores*, 15 N. J. 191 (1954), appeal denied 99 L. ed. 677, 348 U. S. 859 (1954).

The complaint charges that defendant sold plaintiff's products below the minimum prices fixed by it, in that in some instances, while selling at the minimum prices, it gave to its customers "S. & H. Green Cooperative Cash Discount Stamps," which are redeemable for merchandise, thus in effect lowering the prices of plaintiff's products below the minimum by the amount of the discount represented by the stamps. Whether this constitutes willfully and knowingly advertising or selling plaintiff's products at less than the prices stipulated by it—which defendant denies—need not be now decided. See *E. R. Squibb & Sons and Eli Lilly & Company v. Charline's Cut Rate, Inc.*, 9 N. J. Super. 328 (Ch. Div. 1950); *Bristol-Myers Co. v. Picker*, 96 N. E. 2d 177 (Ct. App., N. Y. 1950); *Bristol-Myers Co. v. Lit Brothers, Inc.*, 6 A. 2d 843 (Sup. Ct., Pa. 1939); *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, 131 P. 2d 856 (Dist. Ct. App., Cal. 1942); *Sperry and Hutchinson Co. v. Margetts*, 15 N. J. 203 (1954). Defendant is

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charged also with violating the minimum price structure by selling other products of the plaintiff below the minimum prices in cases where no stamps were given. Plaintiff originally applied for an interlocutory injunction (R. R. 4:67) to enjoin all sales by defendant below minimum prices until final hearing.

Defendant admitted the sales but denied that in any instance the sales were below minimum prices or that there were any willful and knowing sales below such prices, in violation of N. J. S. 56:4-6. With respect to the sales made of products other than those with which stamps were given, defendant states that it made up packages from bulk shipments and that the products of plaintiff were packaged under defendant's name and, therefore, they were exempt under the provisions of N. J. S. 56:4-5(1). It is doubtful that this constitutes a good defense because the bottle which was marked in evidence clearly disclosed that the plaintiff's name and trademark appeared on the label, and defendant was obviously seeking to gain the benefit of plaintiff's good will. This may not be done. *Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585, 586 (E. & A. 1937).

The substantial defense interposed is that plaintiff, being a foreign corporation, was required as a condition precedent to transacting business in this state to file with the Secretary of State, under N. J. S. 14:15-3, a copy of its certificate of incorporation and a statement providing information required by that section; and, as a preliminary to instituting suit in this state "upon any contract made by it in this state," was required to obtain a certificate from the Secretary of State under N. J. S. 14:15-4. It is conceded that neither of the last cited sections has been complied with by the plaintiff.

Plaintiff's application for an interlocutory injunction was denied on the ground that its right to relief was not

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clear as a matter of law, in view of the above mentioned legal defenses. *General Electric Co. v. Gem Vacuum Stores*, 36 N. J. Super. 234 (App. Div. 1955); *Wilentz v. Crown Laundry Service, Inc.*, 116 N. J. Eq. 40 (Ch. 1934); *Allman v. United Brotherhood of Carpenters, etc.*, 79 N. J. Eq. 150, 155 (Ch. 1911).

The matter is now before the Court on defendant's motion to strike the complaint and for summary judgment on the ground that the plaintiff is transacting business in this state contrary to N. J. S. 14:15-3 and, being a foreign corporation, is precluded from bringing this action under N. J. S. 14:15-4. As an integral part of these defenses, the defendant urges the provisions of N. J. S. 14:15-5, where it is provided as follows:

"14:15-5. Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations

When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

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The State of Indiana has a similar statute, and the requirements of that state upon foreign corporations are much more onerous than those imposed by our statute. The Indiana statute (Burns' Annotated Statutes of Indiana) provides:

"25-314: Penalties. No foreign corporation transacting business in this state without procuring a certificate of admission or, if such a certificate has been procured, after its certificate of admission has been withdrawn or revoked, *shall maintain any suit or proceeding in any of the courts of this state upon any demand, whether arising out of contract or tort; and every such corporation so transacting business shall be liable by reason thereof to a penalty of not exceeding ten thousand dollars (\$10,000), to be recovered in any court of competent jurisdiction in an action to be begun and prosecuted by the attorney general in any county in which such business was transacted.*

"If any foreign corporation shall transact business in this state without procuring a certificate of admission, or, if a certificate has been withdrawn or revoked, or shall transact any business not authorized by such certificate, such corporation *shall not be entitled to maintain any suit or action at law or in equity upon any claim, legal or equitable, whether arising out of contract or tort, in any court in this state; and it shall be the duty of the attorney general, upon being advised that any foreign corporation is so transacting business in this state, to bring action in the circuit or superior court of Marion County for an injunction to restrain it from transacting such unauthorized business and for the annulment of its certificate of admission, if one has been procured.*

• • •" (Emphasis supplied.)

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Plaintiff argues that it is not doing business in this state and that, even if it be held that it is, the above cited provisions of our Corporation Act do not apply to it because its goods are distributed solely in interstate commerce, thus exempting it from the provisions of any regulatory state statute of the kind above quoted, and that to apply to it the provisions of N. J. S. 14:15-3, 4 and 5 is to impose a burden upon interstate commerce which is forbidden by the commerce clause of the Federal Constitution (*United States Constitution*, Article I, Sec. 8, Clause 3).

Plaintiff countered the motion to dismiss with a renewal of its motion for interlocutory injunction on the ground that, if the defendant's motion should be denied, then plaintiff's motion should be granted because then its right to relief as a matter of law would be clear, thus eliminating the reason for the original denial of its motion.

I.

Is the plaintiff doing business in New Jersey? The facts in the affidavits filed in support of the respective motions differ in only one material respect. Defendant says that plaintiff's salesmen, or "detailmen" as plaintiff calls them, in New Jersey accept orders for the purchase of plaintiff's products, while plaintiff denies this to be true and says that, even though on occasions its representatives may receive an order for plaintiff's products, they do so only for the purpose of transmitting the same to the wholesaler and that such orders are subject to acceptance or rejection by such wholesaler. In view of the result reached, this fact is immaterial, but it will be assumed that the plaintiff's statement is correct.

The facts are these: Plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building.

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(The September 1959 issue of the Newark Telephone Directory lists the plaintiff both in the regular section and in the classified section under "Pharmaceutical Products" as having an office at 60 Park Place, Newark.) The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino "for all expenses incidental to the maintenance and operation of said office." There is a secretary in the office, who is paid directly by the plaintiff on a salary basis. There are eighteen "detailmen" under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commission. Many, if not all of them, reside in the State of New Jersey. Whether plaintiff pays unemployment, or other taxes to the State of New Jersey is not stated. It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is "promotional and informational only." On an occasion, these detailmen, "as a service to the retailer," may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield stores. Plaintiff says that all of its fair trade contracts and orders for its products are subject to acceptance in Indiana, and therefore none of

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them constitutes a contract made, or order taken, in this state.

Despite the above recited facts, plaintiff insists that it is not doing business in New Jersey. It concedes that, perhaps for the purpose of having service of process made upon it in a suit in which it is a defendant, it might conceivably be properly served within this state. But, it says that, although it may be subject to the jurisdiction of the state courts and amenable to service of process therein when it is sued, it is not subject to the statute regulating foreign corporations or prescribing the conditions of their doing business in that state. 146 A. L. R. 942. The difference, it is claimed, is ascribable to the fact that the power of a state to subject a foreign corporation engaged in interstate commerce to local regulations is limited and restricted by the commerce clause of the Federal Constitution. On this subject, more hereafter.

The New Jersey Corporation Act does not define "transacting any business" in this state. Our Supreme Court, in *A & M Trading Corp. v. Pennsylvania R. Co.*, 13 N. J. 516 (1953), quoting with approval from *Yedwab v. M. A. Richards Corp.*, 137 N. J. L. 448 (Sup. Ct. 1948), observed that doing business is a term that is not susceptible of precise definition automatically resolving every case, and that each case turns upon its own circumstances.

To hold under the facts above recited that plaintiff is not doing business in New Jersey is to completely ignore reality. A corporation thus acting within this state should not be permitted to take advantage of the laws of this state which promote its business, such as the Fair Trade Act (which is the sole basis for this suit), and yet not comply with reasonable regulatory provisions of our Corporation Act. As is noted in 146 A. L. R. 957, where this subject is discussed in detail, many corporations selling products in the several states act, with a studied purpose, to avoid

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the necessity of conforming to state laws or becoming subject to service of process. *The Shovel Co. v. Superior Ct.*, 95 P. 2d 149 (App. Ct., Cal. 1939).

Most of the cases in which the question of whether a corporation is or is not doing business in a particular state has arisen are those in which service of process was attempted to be made upon a foreign corporation or a tax was sought to be assessed. See *Miklos v. Liberty Coach Co.*, 48 N. J. Super. 591 (App. Div. 1958); *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. ed. 95 (1945); *McGee v. International Life Ins. Co.*, 355 U. S. 220, 2 L. ed. 2d 223 (1957); *A & M Trading Corp. v. Pennsylvania R. Co.*, *supra*; *Westerdale v. Kaiser-Frazer Corp.*, 6 N. J. 571 (1951). The present case is the converse of those cited. Here, the plaintiff seeks not to avoid service, but to be permitted to sue.

If, as stated in the *Miklos* case (quoting from the *International Shoe Co.* case), at p. 598, "that in order to subject a foreign corporation to a judgment *in personam*, if it be not present within the territory of the forum, it have 'certain minimum contacts with (the forum) such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice,'" " so the plaintiff here, in the interest of fair play and substantial justice, should not object to complying with the requirements of the Corporation Act and securing a certificate to do business here, thus enabling it to maintain its suit. This, however, the plaintiff refuses to do. It has been held that such a certificate is secured timely if taken out pending an action. *Lehigh, &c., Co. v. Atlantic S. & R. Works*, 92 N. J. Eq. 131, 148 (Ch. 1920). It has been stated that the effect of the *International Shoe Co.* case was to establish a rule that, where a foreign corporation is present within the state, the court looks not only to the regularity, continuity and extent of the corporate activity within the state, but also

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to whether the cause of action asserted resulted from the corporate activity within the state and the convenience to the parties. *Fletcher, Corporations*, Sec. 8713.1, pp. 419-420.

Plaintiff cites *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Sup. Jud. Ct., Mass. 1959), as an example of a case where a foreign corporation, under facts quite similar to those here, was held not to be doing business in Massachusetts and was not required to secure a certificate to do business as a condition precedent to securing relief under the local Fair Trade Act. The suit was started under the Massachusetts Fair Trade Act, and the defenses here interposed were there set up, but overruled. Plaintiff was granted an injunction. The Massachusetts court held that Remington was not doing business within that state and had a right to use the facilities of the Massachusetts courts. Significantly, however, the court said, at p. 138, that its findings were based upon earlier decisions and that it had not been asked to reconsider those in the light of subsequent United States Supreme Court decisions broadening the scope of local regulations dealing with foreign corporations. It would appear, therefore, that, if this precise point had been argued, the result might have been different.

Applying the tests set forth in the cited authorities to the undisputed evidence disclosed by the affidavits, the conclusion is inescapable that the plaintiff was in fact doing business in this state at the time of the acts complained of and was required to, but did not, comply with the provisions of the Corporation Act.

II.

Plaintiff contends that it is excepted from any requirement to comply with foreign corporation provisions of our Corporation Act because it is engaged entirely in interstate

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commerce, and that it is unlawful for any state to impose such regulations upon interstate commerce as will constitute a burden thereon.

Not all state regulations affecting foreign corporations constitute a burden upon interstate commerce, thereby rendering them unconstitutional. *General Electric Co. v. Packard Bamberger & Co.*, 14 N. J. 209, 221 (1953). The regulation is only unlawful if it materially restricts the free flow of commerce across state lines. In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. ed. 1915, 1925 (1945), the court said:

“ * * * There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.”

Plaintiff relies heavily for support of its argument on *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678 (1910). There, the court struck down a Kansas statute requiring a foreign corporation to secure a certificate to do business as a condition precedent to instituting suit. A comparison of the Kansas statute with ours will show that the requirements of that statute were much more onerous than those in our statute. It is interesting to note, also, that the court did not specifically pass upon the requirement that the corporation have a certificate before instituting suit, but held that, since this section of the statute was so connected with the other sections held unconstitutional as to be inseparable, it too, had to fall. The court went on to say, at page 687:

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“ * * * How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. * * * ”

This case was followed by our former Supreme Court in *Federal Schools, Inc. v. Sidden*, 14 N. J. Misc. 892 (1936), but the decision in that case rested not upon any alleged illegal interference with interstate commerce, but upon the fact that the contract sued upon, being one made outside of New Jersey, was not interdicted by the provisions of then Section 98 of the Corporation Act (now N. J. S. 14:15-4).

The trend and philosophy of the more recent cases has been in favor of upholding, rather than striking down, reasonable state regulations of foreign corporations. This is illustrated by the very recent case of *Portland Cement Co. v. Minnesota*, 3 L. ed. 2d 421, 79 S. Ct. (1959), in upholding a state income tax imposed upon a foreign corporation. In sustaining the right of a state to exact an income tax from a foreign corporation upon that portion of its profits derived from activities within the state, the court said, at page 429:

“ * * * While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. * * * ”

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As early as 1908 the Supreme Court, in *Galveston, H. & S. A. R. Co. v. Texas*, 52 L. ed. 1031, 210 U. S. 217 (1908), said:

"It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. * * * "

If the levying of an income tax on the business of a foreign corporation which is generated within a state is not a burden upon interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden upon interstate commerce?

It must also be borne in mind that the cause of action here sued upon arises only because of the provisions of our Fair Trade Act. Such contract as the plaintiff relies upon would be illegal except for the provisions of that statute. *General Electric Co. v. Packard Bamberger & Co., supra.* Can it be said that there is anything unfair about requiring a foreign corporation, which seeks to take advantage of a cause of action given it by one of our laws, to comply with the provisions of the other as a condition to taking advantage of the other statute? To pose the question is to suggest the answer.

In the *General Electric Co.* case, the court said that, although the power of Congress over interstate commerce may be exclusive as to a direct statutory regulation of interstate commerce as such, the states are authorized under pertinent decisions of the United States Supreme Court (citing cases) to enact regulations which affect all business done in the state, if such regulations are reasonable and not

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burdensome to interstate commerce. The simple requirements of our Corporation Act are reasonable and cannot be called burdensome. To hold that these regulations constitute such a burden upon interstate commerce as to exempt the plaintiff from the provisions thereof is to indulge in an unwarranted legalism.

The cases of *Seagram Distillers Company v. Coorensweat*, 281 S. W. 2d 657 (Sup. Ct., Tenn. 1955); *State v. Ford Motor Co.*, 38 S. E. 2d 242 (Sup. Ct., S. C. 1946); *Bulova Watch Co. v. Anderson*, 70 N. W. 2d 243 (Sup. Ct., Wis. 1955), cited by plaintiff in support of its position, have been examined, and the holdings there do not require any change in the result here reached.

III.

Finally, it is argued that the provisions of N. J. S. 14:15-4 do not apply because that section precludes the maintaining of an action in this state only "upon any contract made by it (the foreign corporation) in this state." Admittedly, the 1500 contracts made by plaintiff with its retailers are Indiana contracts, since they were subject to acceptance there, and it is said that the orders received for plaintiff's products are likewise subject to acceptance in Indiana.

That this statute is ordinarily limited to contracts made in this state has been held in several cases. *Federal Schools, Inc. v. Sidden, supra* (and the numerous cases therein cited); *Protective Finance Corp. v. Glass*, 100 N. J. L. 85 (Sup. Ct. 1924); *Lehigh, &c., Co. v. Atlantic S. & R. Works, supra*. None of these cases was a suit upon a cause of action arising only out of one of our statutes. Also, this argument does not take into consideration the provisions of N. J. S. 14:15-5 (sometimes referred to as a "mutual spite" or "retaliatory" statute). Most states, including, as above noted, Indiana, have such statutes.

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The Indiana statute bars suits arising out of contract, as well as tort, whether such actions are at law or in equity. Plaintiff argues that its action is one in tort and therefore not precluded by the Corporation Act. It would seem, however, that the action is one on contract because, while the defendant is a non-signer of a fair trade contract, it is liable under the statute since other persons have signed such contracts. Non-signers have been held to be bound to the same degree as signers. See *Old Dearborn D. Co. v. Seagram-Distil. Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936); *Lionel Corp. v. Grayson-Robinson Stores, supra*.

Quaere: Under these circumstances, is not the relationship of the plaintiff and defendant one of a contract made in the State of New Jersey, created by the Fair Trade Act as a result of the signing of other contracts by persons in New Jersey?

N. J. S. 14:15-5 was discussed in *Ex-Cell-o Corp. v. Farmers Coop. Dairies Ass'n*, 28 N. J. Super. 159 (App. Div. 1953), but its provisions were not applied because the defense was first raised on appeal, and not below. That opinion indicates—without stating reasons—that this may be a disfavored defense. But, when timely raised, as here, it should not be so considered. No valid reason is given by plaintiff why the provisions of the statute should not be applied, except the argument concerning interstate commerce heretofore disposed of: In *Babe Kaufman Music Corp. v. Mandia*, 127 N. J. Eq. 480 (Ch. 1940), this defense was interposed and the court, after reviewing the retaliatory provisions of the New York Corporation Law—the plaintiff being a corporation of New York—refused to enforce the contract.

While it is clear that the provisions of N. J. S. 14:15-4 apply, and that the relationship between plaintiff and defendant is based upon a contract made in this state by virtue

*Appendix C—Opinion of Superior Court of
New Jersey, Chancery Division.*

ture of the Fair Trade Act, it is also clear that the provisions of N. J. S. 14:15-5 are applicable and, based upon the retaliatory provisions of the Indiana statute, the plaintiff's suit is barred. The plaintiff's application for an interlocutory injunction, therefore, is denied.

Since the affidavits disclose palpably that there is no genuine issue as to any material fact, the defendant is entitled to a summary judgment dismissing the complaint, with costs. R. R. 4:58-3; *Frank Rizzo, Inc. v. Alatsas*, 27 N. J. 400, 405 (1958).

A judgment may be presented in accordance with these conclusions.

APPENDIX D.**Final Judgment of Superior Court, Chancery Division.**

(Filed October 1, 1959 at 1:55 p. m.)

This matter having been opened to the Court on Friday, August 21, 1959 by Lum, Fairlie & Foster, Attorneys for Defendant (William F. Tompkins and Warren E. Dunn appearing) in the presence of Lorentz & Stamler, Attorneys for Plaintiff (Melvin P. Antell appearing) and in the presence of Casey, Lane & Mittendorf of the New York Bar, of Counsel to the Defendant (Roger Lloyd and Klaus Motulsky appearing), upon Defendant's motion to dismiss the complaint, and the Court having considered all of the pleadings, affidavits, exhibits and proofs, and the Court having further considered the argument of counsel thereon, and the Court having rendered a written opinion on September 29th, 1959, for the reasons therein stated,

It is on this 1st day of October, 1959;

ORDERED and ADJUDGED that the Complaint be and the same hereby is dismissed, with costs to the defendant.

EVERETT M. SCHERER,
J. S. C.

We hereby consent to the form of the foregoing order.

LORENTZ & STAMLER,
Attorneys for Plaintiff,
By MELVIN P. ANTELL,
A Partner.

APPENDIX E.

Sections of New Jersey Revised Statutes Involved.

14:15-3.

"Copy of charter and statement to be filed; certificate of authority to do business. Every foreign corporation, except banking, insurance, ferry and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal, and a statement attested in like manner setting forth:

"a. The amount of its authorized capital stock and the amount actually issued;

"b. The character of the business which it is to transact in this state; and

"c. The principal office of the corporation in this state and the name and place of abode of an agent upon whom process against such corporation may be served, which agent shall be a domestic corporation or a natural person of full age actually resident in this state, and the agency shall continue until the substitution, by writing, of another agent.

"Thereupon the secretary of state shall issue to the corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and he shall keep a record of all such certificates issued."

14:15-4.

"Certificate of authority to do business prerequisite to suits on contracts. Until such corporation so transacting business in this state shall have

Appendix E—Sections of New Jersey Revised Statutes Involved.

obtained such certificate of the secretary of state, it shall not maintain any action in this state upon any contract made by it in this state."

14:15-5.

"Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations. When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

14:15-6.

"Penalty for failure to obtain certificate of authority to do business. Every foreign corporation transacting any business, directly or indirectly, in this state, without having first obtained authority therefor, as provided in section 14:15-3 of this title, shall for each offense forfeit to the State the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the attorney general in the name of the state."

FILE COPY

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 203

ELI LILLY AND COMPANY,

Appellant,

v.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE ~~SUPREME COURT OF NEW JERSEY~~

MOTION TO DISMISS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 203

Eli Lilly and Company,

Appellant,

Sav-On-Dives, Inc.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

— ♦ —
MOTION TO DISMISS

Appellee moves pursuant to Rule 16, Supreme Court Rules (28 U.S.C.) to dismiss the appeal herein on the grounds that the appeal does not present a substantial federal question and that the judgment rests on an adequate non-federal basis.

Appellant, an Indiana manufacturer of pharmaceuticals, sells its products to New Jersey wholesale druggists in interstate commerce. Appellant does not sell direct to New Jersey retail druggists.

Appellee operates two retail drug stores in New Jersey. Appellee buys nothing direct from appellant and has not signed appellant's fair trade contract. It gets its Lilly products from New Jersey wholesalers.

Appellant instituted this action to enjoin appellee from selling Lilly products below established fair trade prices.

Upon motion, the trial court dismissed the complaint because appellant had not registered in New Jersey as a foreign corporation doing business in New Jersey pursuant to N.J. R.S. 14:15-3 to 5. The Supreme Court of New Jersey affirmed the trial court's judgment for the reasons stated in the lower court's opinion (J.S. p. 21; 23).

Appellant's Jurisdictional Statement seeks to convey the impression that its business activities in the State of New Jersey were exclusively in interstate commerce. This is in fact not the case, and appellant's assertion that the trial court conceded "that appellant's business was entirely in interstate commerce" (J.S. p. 5) is wholly unwarranted.

The truth, as the record amply demonstrates, is that appellant is engaged in intrastate as well as interstate commerce.

Appellant sells its products to selected wholesalers in New Jersey "pursuant to distributor contracts made in the State of Indiana" (affidavit of Clutter). This is its interstate business.

Appellant's intrastate business in New Jersey is carried on by twenty employees: a district manager, secretary, and eighteen so-called "detail men". Their headquarters are in Newark, New Jersey, and all of them we believe are residents of New Jersey, two of them certainly are (affidavit of Herring), and their activities, as we shall show, are essentially local and intrastate.

The place where the district manager and secretary have their office and which serves as headquarters for the eighteen detail men who cover the State, is listed in the building directory and in the Newark telephone book under the name of Eli Lilly & Company (affidavit of Sirota, Opinion, J.S. p. 29). The lease is in the name

of the district manager, but it is appellant's name that is on the door and appellant reimburses the district manager for all expenses incidental to the maintenance and operation of the office (affidavit of Audino). The salaries of the secretary, the eighteen detail men, and, of course, the district manager, are paid by Lilly (affidavit by Audino). None are in any sense independent agents or contractors.

The function of the detail men is to promote *intrastate* sales of Lilly products. "They do not accept orders under any circumstances for the purchase of Eli Lilly & Company products" (affidavit of Audino). They will transmit orders to New Jersey wholesalers who can do what they please with them (affidavit of Audino). Apparently, they *never* transmit orders direct to the home office in Indiana.

The local sales are promoted by appellant's detail men by visits to retail pharmacists, physicians and hospitals, in the course of which (1) they describe the various Lilly products and urge that they be prescribed by the physicians, (2) they check up on "the stocks and inventory of the retailer to ascertain whether the retailer may be carrying a sufficient supply to meet potential demand"; (3) they recommend (as what salesman does not) "the enlargement of his available supply", (4) they transmit orders to the wholesalers, (5) they provide the retailer with advertising and promotional material (affidavit of Audino), (6) they urge pharmacists, physicians and hospitals to "order Lilly products from local wholesale distributors" (affidavit of Clutter), and (7) they police appellant's fair trade prices (affidavit of Herring; Complaint). Granted that the local sales that these men generate are, presumably, reflected by interstate sales to the local wholesalers, it is clear that their activities are studiously confined to intrastate sales promotion and service.

The significance of the foregoing facts was not lost on the trial court. After summarizing them (J.S. pp. 28-30) he said, "Despite the above recited facts, plaintiff insists that it is not doing business in New Jersey" (J.S. p. 30), and then, after examining the authorities, went on to say "the conclusion is inescapable that the plaintiff was in fact doing business in this state at the time of the acts complained of" (J.S. p. 32).

It is settled law (and conceded by appellant (J.S. p. 11)) that a corporation organized in one state, which engages both in intrastate and interstate commerce in another state may be required to register pursuant to the laws of the latter prior to instituting a lawsuit in that state, *Railway Express Co. v. Virginia*, 282 U. S. 440 (1931), *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944).

In appellee's view, therefore, the decision below rests on an independent, non-federal basis. Moreover the record does not raise any federal question, let alone any substantial federal question.

Appellant *per contra* contends that New Jersey's foreign corporation registration law (N.J. R.S. 14:13-30-5), as interpreted by the courts below in this action, imposes an unreasonable burden on interstate commerce.

All that the New Jersey law requires of a foreign corporation doing business in the State is that it file with the Secretary of State a copy of its charter plus a statement describing its capital stock, the character of its business, its principal office in the State and the name and address of an agent to accept service of process. Upon compliance with the above, a certificate authorizing the corporation to do business must be issued as a matter of course. No discretion is vested in the Secretary of State to refuse it. (N.J. R.S. 14:15-3). Once the foreign corporation registers it may enforce a contract made

before registration. The foreign corporation may even register during the pendency of the suit and thereupon be permitted to continue the action. *Protective Finance Corp. v. Glass*, 100 N. J. L. 85, 425 Atl. 879 (Sup. Ct., 1924); *Day v. Stokes*, 97 N. J. Eq. 378, 127 Atl. 331 (E. & A., 1925).

A mere listing of the requirements of the statute which must be complied with prior to institution of an action by such a corporation indicates that we are not here dealing with an unreasonable burden on interstate commerce.

The most that can be said is that a foreign corporation doing business in New Jersey, such as Eli Lilly, is thereby (1) subjected to a minimal amount of paper work, and (2) obliged to designate an agent for service of process in the State. It is submitted that the designation of an agent for service of process can no longer be considered a significant burden on a corporation doing business in another state, in view of the fact that such corporation, even if it has only minimal contacts with such state, is in any event subject to suit therein regardless of whether or not it has designated an agent for service of process. *International Shoe Co. v. State of Washington*, 326 U. S. 310 (1945); *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957).

Balanced against this insignificant "burden" imposed on foreign corporations by the New Jersey registration requirement is the State's legitimate interest in insuring thereby (1) that its residents have an easy, certain and expeditious means of serving process on foreign corporations doing business in the State, and (2) that the corporation's presence in the State is brought to the State's attention so that compliance with its unemployment insurance, disability insurance, and workmen's compensation laws covering the corporation's local employees (appellant

has twenty such employees), as well as its tax and other laws may be assured.*

This Court, in *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944) upheld a Minnesota foreign corporation registration requirement which was practically identical with the one here under review. In that case an unregistered foreign corporation was engaged in the customs brokerage business which, in the language of the Court "aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States" (p. 209). The corporation was barred from maintaining an action against defendant for breach of his fiduciary obligations because of its failure to register in Minnesota.

Addressing itself to Union's claim that the registration requirement violated the Commerce Clause, the Court noted at the outset that:

"It becomes necessary therefore to ascertain precisely what demand the State has here made, in relation to what transactions or activity it is making such demand, in what way federal authority has regulated such transactions or activity, and, finally, whether the Commerce Clause by its own force, in case federal law has not actually taken control, excludes the State from the exercise of the power it has here asserted." (p. 203)

The Court, after concluding that the State could properly legislate despite the presence of federal customs law, stated the crucial issue to be the effect of the registration statute on the Commerce Clause:

"In a situation like the present, where an enterprise touches different and not common interests

* In this connection it may be observed that even a corporation whose sales within the state are made exclusively in interstate commerce may now be subjected to a fairly apportioned state income tax. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959).

between Nation and State, our task is that of harmonizing these interests without sacrificing either." (pp. 207-208)

The Court then noted that although Union Brokerage's business was essentially interstate in character "the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce." (p. 209) Furthermore, the Court noted that Union Brokerage "has localized its business, and to function effectively it must have a wide variety of dealings with the people in the community." (p. 210) This is of course equally true, and in fact more so, in regard to Eli Lilly's business activities in New Jersey. Not only has Lilly localized its activities in the State by maintaining an office there, but as we have noted, practically all of the activities of Lilly's detail men were directed at promoting intrastate sales by New Jersey retailers and wholesalers.

Finally, the Court in *Union Brokerage* distinguished the line of cases led by *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910), relied upon by appellant; on the ground that "we have not here a case of a foreign corporation merely coming into Minnesota to contribute to or to conclude a unitary interstate transaction." (p. 211). This is again equally true in the instant case with reference to Lilly activities in New Jersey.

All that the cases relied upon by appellant hold is that a foreign corporation engaged exclusively in interstate commerce "cannot be denied the right to sue, nor can conditions be imposed on the right to sue, on a cause of action based on a transaction involving interstate commerce." 17 Fletcher, Corporations, §8424, p. 405 (Rev. Vol., 1960. Emphasis supplied). Furthermore, Fletcher significantly cites *Union Brokerage v. Jensen* for the proposition that "there are indications that inter-

state commerce may no longer serve as a barrier to qualification." *Ibid.*, §8422, p. 387.

But regardless whether the older cases relied on by appellant are still good law today, they do not govern the case at bar. In none of them did the corporation concerned maintain an office in the foreign state nor had it otherwise localized its activities to any appreciable extent, and in each of them the barred action arose directly from the corporation's interstate activities.

International Textbook Co. v. Pigg, 217 U. S. 91 (1910), involved a suit by the Textbook Company for money due on a correspondence school contract solicited by an agent in Kansas and accepted in another state. It may be noted also that the foreign corporation registration requirement there involved was far more burdensome in that it required the listing of *all* shareholders of the foreign corporation and that, even after compliance therewith, authority to do business in Kansas could be withheld in the discretion of state officials if they determined that the corporation was financially insecure.

Buck Stove Co. v. Vickers, 226 U. S. 205 (1912), which involved the same Kansas registration statute, was decided merely by relying on the *International Textbook* case, and involved a foreign corporation doing "a purely interstate business." (p. 212)

Sioux Remedy Co. v. Cope, 235 U. S. 197 (1914), involved an Iowa registration statute which, unlike the New Jersey statute, barred all foreign corporations from suing in the State unless they complied with its registration requirements *regardless* of whether they were doing business in the State. Again, the suit attempted to be barred was on money due on the sale of goods solicited and shipped in interstate commerce.

Similarly, both *Dahnke-Walker Milking Co. v. Bondurant*, 257 U. S. 282 (1921) and *Furst v. Brewster*, 282 U. S. 493 (1931) involved lawsuits which arose directly from interstate commerce. In both cases plaintiffs sought enforcement of interstate contracts.

In the case at bar, as in *Union Brokerage*, the lawsuit, which was barred by reason of appellant's failure to register, did not arise out of appellant's transactions in interstate commerce. Conceivably a substantial federal question might have been presented if Eli Lilly had been barred from suing one of its New Jersey wholesalers for the sales price of the products sold to the latter in interstate commerce, but that is not the case.

In final analysis, appellant seeks to enforce in New Jersey courts a right secured by the New Jersey Fair Trade Law to protect the goodwill which it claims to enjoy in New Jersey as a result of its fixed price policy by enjoining a New Jersey retailer from selling Lilly products below the prices stipulated by appellant without, at the same time, recognizing any obligation to reveal its presence to the New Jersey authorities by registering with the Secretary of State as required by New Jersey law.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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VINCENT P. BIUNNO,
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August , 1960.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 2033

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee,

and

STATE OF NEW JERSEY,

Intervenor-Appellee.

**On Appeal From Judgment of the Supreme Court
of New Jersey**

**MOTION TO DISMISS AND
BRIEF IN SUPPORT THEREOF**

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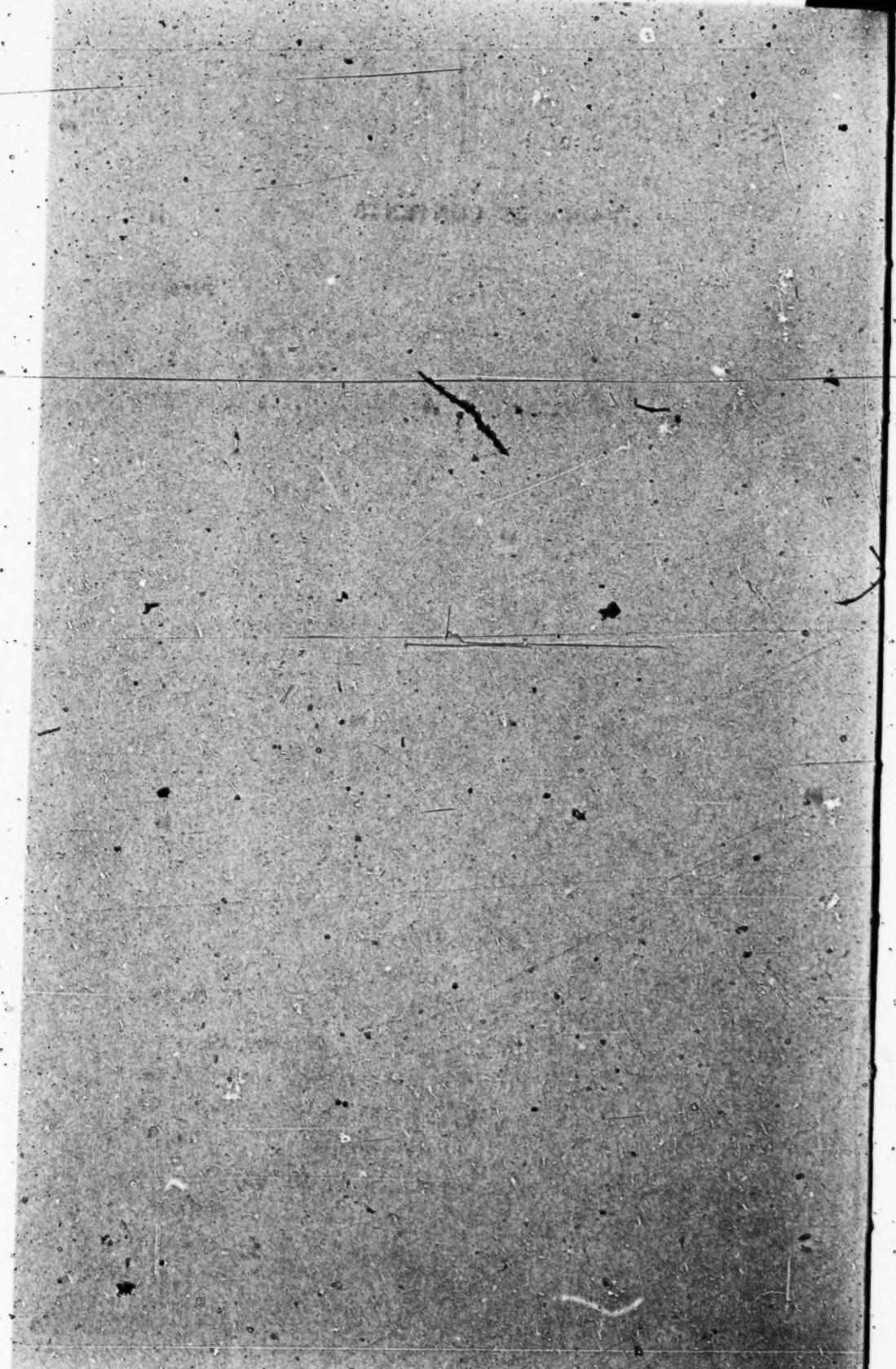


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No.

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee,

and

STATE OF NEW JERSEY,

Intervenor-Appellee.

On Appeal From Judgment of the Supreme Court
of New Jersey.

**Motion to Dismiss or in the Alternative
to Affirm Summarily**

The State of New Jersey, intervenor-appellee, moves to dismiss this appeal on the ground that no substantial Federal question is presented, or in the alternative, to affirm the judgment below summarily on the ground that the said judgment is so clearly correct on the merits that no further argument is required.

Question Presented

When the undisputed facts show that Eli Lilly and Company leases an office and employs a district manager and eighteen full time salaried employees in New Jersey whose work consists of promoting sales and transmitting purchase orders between local wholesalers and local drugstores, is it a violation of the Interstate Commerce Clause of the Federal Constitution for a New Jersey court to dismiss Eli Lilly's Fair Trade suit which seeks to control retail prices in New Jersey, as the result of plaintiff's refusal to register as a foreign corporation?

Summary

Plaintiff, Eli Lilly and Company, leases a New Jersey office and employs a district manager, and eighteen other full time salaried employees in New Jersey to induce New Jersey drugstores to purchase Eli Lilly products from New Jersey wholesalers. Plaintiff's employees also transmit purchase orders from drugstores to wholesalers. Eli Lilly is therefore engaged in *intrastate* commerce in New Jersey. The Fair Trade suit which plaintiff instituted below seeks to enjoin a local drugstore from selling Eli Lilly products to a local customer except at minimum prices fixed by Eli Lilly pursuant to the "nonsigner provision" of the New Jersey Fair Trade Law. Because Eli Lilly is engaged in intrastate commerce, the dismissal of plaintiff's Fair Trade suit as a result of its refusal to register as a foreign corporation does not raise a substantial federal question under the Interstate Commerce Clause.

Even if there were doubt about whether plaintiff's undisputed activities in New Jersey constitute doing a local business, this appeal would still not raise a substantial federal question. The requirement that plaintiff register as a foreign corporation is far lighter than state regula-

tions of corporations engaged in interstate commerce which this Court has frequently upheld. Enforcement of the registration requirement by barring plaintiff from maintaining a Fair Trade suit in the New Jersey courts unless it registers does not unconstitutionally burden interstate commerce because the suit seeks to control retail prices, a matter which Congress has expressly recognized to be a matter for local regulation and because the dismissal of the suit does not prevent plaintiff from continuing its interstate business.

Counter-Statement of Facts*

Eli Lilly and Company (plaintiff-appellant) has appealed to this Court from a judgment of the New Jersey Supreme Court affirming the dismissal of its complaint filed in the New Jersey Superior Court, Chancery Division, against Sav-on Drugs, Inc. (defendant-respondent).

Eli Lilly is a manufacturer of pharmaceutical products which it sells to "local wholesale distributors" throughout the country. (Record 31a-17 to 23, 33 to 40). These wholesalers in turn sell Eli Lilly products to physicians and institutions for their use and to drugstores for retail sale to the general public under Eli Lilly's various trademarks (Record, 31a-28 to 40; 33a-30 to 40; 34a-4 to 27). Sav-On Drugs, Inc. is the operator of two New Jersey drugstores which sell Eli Lilly products. Record, 28-15 to 24.

Plaintiff's complaint alleges that Sav-On Drugs, Inc.'s two New Jersey drugstores have sold commodities bear-

* Unless otherwise indicated page references to "Record" refer to the pages of the plaintiff's printed appendix which is entitled in the Superior Court of New Jersey and was filed in the Supreme Court of New Jersey. This appendix constitutes the record which the Clerk of the Supreme Court of New Jersey was requested to transmit to the Clerk of the Supreme Court of the United States.

ing Eli Lilly trade-marks at prices lower than those stipulated in plaintiff's minimum retail price maintenance contracts. (Record, 10a-22 to 35; 11a-9 to 34). Although Sav-On Drugs has not entered into any such contracts, plaintiff alleges that Sav-On Drugs is legally obligated to maintain the minimum prices specified therein because of the "nonsigner provision" of the New Jersey Fair Trade Law (N. J. Rev. Stat. 56:4-6). (Record, 2a-22 to 40; 3a-5 to 13). On the basis of these allegations, plaintiff's complaint asks for an injunction against Say-On Drugs, Inc. to prevent any further violations of Eli Lilly's price maintenance program. (Record, 12a-30 to 40; 13a-5 to 15).

On defendant's motion for summary judgment, the complaint was dismissed on the ground that the undisputed facts contained in the affidavits of both parties showed that Eli Lilly was a foreign corporation doing business in New Jersey without having registered with the New Jersey Secretary of State: N. J. Rev. Stat. 14:15-3, 14:15-4 and 14:15-5. The trial court expressly held first, that the continuous course of activity which Eli Lilly was conducting in New Jersey constituted "transacting * * * business" within the meaning of N. J. Rev. Stat. 14:15-3; and, secondly, that a suit under the "nonsigner provision" of the New Jersey Fair Trade Law (N. J. Rev. Stat. 56:4-3) was a suit "upon a contract made in this State" within the meaning of N. J. Rev. Stat. 14:15-4. (Opinion, Plaintiff's Appendix C.)

The New Jersey Supreme Court affirmed without opinion.

The affidavits on the motion for summary judgment show that although Eli Lilly itself sells its products only to local wholesalers, Eli Lilly employees conduct an extensive campaign in New Jersey to induce local drugstores, physicians and hospitals to purchase Eli Lilly products from these New Jersey wholesalers. Eli Lilly and Company employs a district manager and eighteen salaried "retail men" in New Jersey to visit retail pharmacists, physicians and hospitals (Record, 33a-29 to 40) and to perform "promotional and informational work * * * to acquaint retail

pharmacists, physicians and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians and hospitals will order Lilly products from local wholesale distributors" (Record, 31a-33 to 39). Eli Lilly's "detail men" examine the retailer's stock "to ascertain whether the retailer may be carrying a sufficient supply to meet potential demand," and they make "recommendations to the retailer relating to the enlargement of his available supply" (Record, 34a-19 to 26). This is done "with a view to encourage the purchase and use of said retail products by such institutions and professional men" (Record, 33a-38 to 40). Plaintiff's "detail men" receive orders from retailers in the course of their work, and they transmit such orders to the appropriate local wholesaler for the latter's acceptance or rejection (Record, 34a-9 to 14).

To support its campaign of promoting local sales by local wholesalers, plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Although this office is leased in the name of plaintiff's manager, he is reimbursed by plaintiff "for all expenses incidental to the maintenance and operation of said office" (Record, 33a-18 to 29). Eli Lilly's name appears on both the door of the office and on the tenant registry in the lobby of the building (Record, 27a-20 to 26). The September 1959 issue of the Newark telephone directory lists the plaintiff in both the regular section of the directory and also in the classified section under "pharmaceutical products" as having an office at 60 Park Place, Newark (Opinion, Appendix C, p. 29). This office is in charge of plaintiff's district manager and a secretary, both of whom are paid by plaintiff on a salary basis (Record, 33a-10 to 34). Both the plaintiff corporation and its district manager receive correspondence there (Record, 33a-25 to 32).

Eli Lilly and Company has entered into over 1500 Fair Trade contracts with New Jersey retail druggists to control the prices of retail sales of its products within the State

(Record, 2a-39 to 3a-8). The record does not show how many other New Jersey druggists there are who, without themselves having signed plaintiff's Fair Trade contracts, are nonetheless legally obligated to maintain Fair Trade prices because of the "nonsigner provision" of the New Jersey law. To enforce its retail price maintenance program in New Jersey, plaintiff has instituted at least 33 separate legal proceedings in New Jersey courts to secure injunctive relief against New Jersey retailers (Record, 4a-8 to 5a-40).

ARGUMENT

POINT I

The dismissal of Eli Lilly's Fair Trade Suit for its failure to register as a foreign corporation does not raise a substantial federal question because Eli Lilly is engaged in *intrastate commerce* in New Jersey.

Eli Lilly has set forth the rule of law which, in view of the undisputed facts of this case, requires the dismissal of this appeal on the ground that it does not raise a substantial federal question. Plaintiff expressly admits that if its activities in New Jersey constitute doing business in *intrastate commerce*, there is no constitutional bar to the dismissal of its suit because of its failure to register as a foreign corporation. Its brief states:

"The rule of the *Paul* case still applies to foreign corporations as regards *intrastate commerce* in which they engage within a state, even if such *intrastate business* is done by a corporation which is also engaged in *interstate commerce*. See, e.g., *Railway Express Co. v. Virginia*, 282 U. S. 441 (1931); *General Ry. Signal Co. v. Virginia*, 246 U. S. 500 (1918). Such corporations are, of course, required to comply with state qualification statutes." (Emphasis added.)

The decisions of this Court fully support, and indeed compel, plaintiff's concession that if it is engaged in intrastate commerce in New Jersey, the dismissal of its Fair Trade suit has not deprived it of any federally protected right: See *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328 (1903); *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 36 S. Ct. 168, 60 L. Ed. 439 (1916); *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944). A statute would be constitutional which voided every New Jersey contract dealing with an intrastate transaction if the contract was made by an unregistered foreign corporation doing both an interstate and a local business in New Jersey. See *Diamond Glue Co. v. U. S. Glue Co.*, *supra*. The penalty for non-registration which New Jersey actually imposes is less stringent. Plaintiff can reinstate its suit at any time if only it complies with N. J. Rev. Stat. 14:15-3, by furnishing the New Jersey Secretary of State with a copy of its certificate of incorporation and a statement setting forth the amount of its authorized and of its issued capital stock, the character of its New Jersey business, the address of its principal office in New Jersey and the name and place of abode of a resident agent for service of process. See: *Day v. Stokes*, 97 N. J. Eq. 378, 127 At. 331 (E. & A. 1925); *Farmers Mutual Hail Insurance Co. of Iowa v. Gorsuch*, 123 Ind. App. 264, 110 N. E. 2d 344 (Ind. Appellate Ct. 1953). Therefore, if Eli Lilly is engaged in an intrastate business in New Jersey, there cannot be the slightest doubt of the constitutional validity of the judgment appealed from.

Before proceeding to demonstrate that Eli Lilly is engaged in intrastate commerce in New Jersey, an erroneous statement contained in plaintiff's brief should be corrected. Eli Lilly suggests that the trial court dismissed its suit "While conceding that appellant's business was entirely in interstate commerce ***" (Jurisdictional Statement, p. 5). The court made no such concession. The only thing that

the lower court said about that issue at the page of its opinion cited by plaintiff (Opinion, Plaintiff's Appendix C, p. 28) is that "Plaintiff's products are sold to selected wholesale distributors *and* in interstate commerce." (Emphasis added.) That is a far cry from a concession that plaintiff's only business is in interstate commerce. The New Jersey court's opinion states that "plaintiff was, in fact, doing business in this state * * *" (Opinion, Plaintiff's Appendix C, p. 32). It certainly did not say that Eli Lilly was doing a purely interstate business.

This Court, however, has squarely held that activities identical with those of Eli Lilly in New Jersey constitute doing business in intrastate commerce. *Cheney Bros. Co. v. Mass.*, 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632 (1918), holds that when a foreign corporation, acting through its own employees does sales promotion work on behalf of local wholesalers and transmits to such local wholesalers the purchase orders which it has received from local retailers, the foreign corporation is engaged in local commerce. The ultimate issue presented by the *Cheney Bros. Co.* case was the constitutionality of an excise tax which Massachusetts had imposed on the privilege of doing a local business. This Court held that the excise tax was constitutional as applied to a Minnesota corporation whose operations and status were described as follows:

"This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. *Of course this a do-*

mestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the State, regardless of the motive with which it is conducted.” (Emphasis added) (246 U. S. at 155)

Except that Eli Lilly produces and sells pharmaceutical products rather than flour, the language quoted above from the *Cheney Bros. Co.* case describes Eli Lilly's activities in New Jersey. Eli Lilly's detailmen promote local sales between wholesalers and drug stores. The detailmen receive purchase orders from drug stores whose inventories they examine and transmit those orders to local wholesalers. The sales are between local wholesale merchants and local retailers. In a similar way, Eli Lilly also promotes local sales between wholesalers and local physicians and institutions. Because part of Eli Lilly's business is, in the language of the *Cheney Bros. Co.* case, *supra*, “inducing one local merchant to buy a particular class of goods from another,” Eli Lilly is engaged in local commerce in New Jersey. *Cf. Ruppert v. Morrison*, 117 Vt. 83, 85 Atl. 2d 584 (Vt. Sup. Ct. 1952); *Ligon v. Alexander Film Co.*, 55 S. W. 2d 1030 (Texas Com. of Appeals 1932) (not officially reported) cert. denied 289 U. S. 760 535 S. Ct. 793, 77 L. Ed. 1503 (1933).

Plaintiff's argument has completely missed the distinction between the instant suit and the *Cheney Bros. Co.* case on the one hand and cases such as *International Text-book Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910) on the other. In the *Pigg* case the only activity of the plaintiff's employee within the forum state was to solicit contracts which the plaintiff itself performed by the shipment of materials in interstate commerce and to collect debts which had become due to plaintiff under such contracts. In *Cheney Bros. Co.* and in the instant case, however, plaintiff's employees in New Jersey promoted

sales and transmitted purchase orders between local wholesalers and local retailers. Eli Lilly's only activities in New Jersey do *not* consist of soliciting orders for sales by it from Indiana to its New Jersey customers and collecting the bills for goods due on account of such sales. Because Eli Lilly is engaged in inducing one New Jersey merchant to buy a particular class of goods from another, it is engaged in a domestic business in New Jersey.

Moreover, not only is Eli Lilly engaged in local commerce within New Jersey, but its suit which was dismissed below arises out of that local commerce and seeks to control it. Plaintiff seeks injunctive relief to prevent a New Jersey retailer from violating the New Jersey Fair Trade Law in the course of over-the-counter transactions with New Jersey consumers. These transactions, between a retail drug store and a customer, are obviously local in character. Whether or not Eli Lilly sells its products in interstate commerce to its local wholesale distributors, the wholesalers' sales of Eli Lilly products to local retailers and the retailers' sales to consumers are local, intrastate transactions.

Under such circumstances Eli Lilly has not been deprived of any privilege to which the Commerce Clause entitles it. New Jersey has not prohibited or threatened to prohibit its continuing its interstate business. It may continue without hindrance to sell its products direct to local New Jersey wholesalers and to fill their orders by shipping its goods from its plant in Indiana. In dismissing plaintiff's Fair Trade suit the New Jersey courts have merely implemented the right of the state to bar a suit instituted in a state court by an unregistered foreign corporation which transacts a substantial and continuous intrastate business in New Jersey. Since such state action has long been upheld by this Court, the instant appeal does not raise a substantial federal question under the Commerce Clause, and it should be dismissed.

POINT II

This appeal does not raise a substantial federal question because even if there were doubt that Eli Lilly is doing a local business in New Jersey, the dismissal of its Fair Trade Suit is not violative of the Commerce Clause.

Even if there were a question about whether Eli Lilly does an intrastate business in New Jersey, the dismissal of its Fair Trade suit would not raise a substantial federal question. Even if it were assumed that Eli Lilly is doing business in New Jersey only in interstate-commerce, neither the requirement that it register as a foreign corporation nor the dismissal of its Fair Trade suit as a penalty for non-registration deprives plaintiff of a federally protected right.

First, if Eli Lilly were engaged solely in interstate commerce, would its objection to registering with the New Jersey Secretary of State—considered separately from the dismissal of its suit as a penalty for non-registration—violate the Commerce Clause? The State contends that it would not because compliance is not burdensome and this Court has upheld state regulations of interstate businesses which are far more onerous than registration.

Certainly the burden of registration is not a heavy one. To comply with the statute Eli Lilly would have to furnish the New Jersey Secretary of State with a copy of its certificate of incorporation and a statement showing the amount of its authorized and of its issued capital stock, the character of the business which it is to transact in New Jersey, the principal office of the corporation in the state and the name and abode of a resident agent for service of process. The disclosure provisions of the statute are obviously innocuous, and the appointment of a resident agent would not enlarge plaintiff's existing amenability to

suit. *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945); *Miklos v. Liberty Coach Co.*, 48 N. J. Super. 591, 138 Atl. 2d 462 (App. Div. 1958); N. J. Rev. Rule 4:4-4(d). This "burden" of registration is not so great as to prevent Eli Lilly from continuing to do business in New Jersey.

This Court has frequently upheld the constitutionality of state regulations of foreign corporations engaged in interstate commerce which were at least equally as burdensome as the registration requirement involved in this case. For example, in *Robertson v. People of State of California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946), the Court upheld the constitutionality of a statute which prohibited an agent of a foreign insurance company which was doing business in interstate commerce from soliciting insurance within the state unless both the insurance company and the agent secured state authorization. In *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944), the Court upheld the constitutionality of a state statute requiring the registration of a foreign corporation engaged as a customhouse broker making entry of imported goods. The case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938), upheld a state statute which excluded from state highways vehicles operating in interstate commerce unless they complied with state size and weight regulations. And in *Panhandle Eastern Pipeline Co. v. Michigan Comm'n*, 341 U. S. 329, 71 S. Ct. 775, 95 L. Ed. 993 (1951), the Court upheld the right of a state to exclude a foreign corporation which sought to do only an interstate gas pipeline business within the state until it first secured state authorization. If the requirements which were upheld in those cases are constitutional, certainly there can be no doubt of the constitutionality of requiring Eli Lilly to register as a foreign corporation.

New Jersey's interest in enforcing its foreign corporation registration statute against corporations like Eli Lilly which conduct substantial activities within its borders is at least as great as the interests of the various states whose regulatory statutes were upheld in the cases cited above. New Jersey has a right to be apprised of the presence of foreign corporations which are doing a substantial business within the state regardless of whether that business is characterized as interstate or intrastate. This information is essential in order that the state may determine whether any such corporation is subject to our tax laws or to any of our regulatory statutes such as our Workmen's Compensation and Unemployment Compensation Laws. The information which a foreign corporation is required to file with the Secretary of State also serves an important purpose in enabling the citizens of this state who are doing business with a foreign corporation to ascertain the limits of its corporate authority as fixed by its charter and to discover something of its financial structure from the amount of its authorized and issued capital stock. Although a foreign corporation doing business in New Jersey would be amenable to suit in the courts of this State even if it did not appoint a resident agent for service of process, New Jersey has a justifiable interest in providing its citizens with a simpler and more reliable method for acquiring personal jurisdiction over such a foreign corporation.

Of the decisions of this court cited by plaintiff which have considered the right of a state to enforce its foreign corporation registration statutes by dismissing suits brought by an unregistered corporation, only *International Textbook Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910) and *Buck Stove and Range Co. v. Vickers*, 226 U. S. 205, 33 S. Ct. 41, 57 L. Ed. 189 (1912), both construing the same Kansas statute, hold that the registration provision there involved was itself unconstitutional.

(apart from the penalty of abatement or dismissal) as applied to a foreign corporation doing an interstate business. Those two cases are distinguishable from the case at bar. The Kansas statute under consideration in *Pigg* and *Buck Stove* was far different from N. J. Rev. Stat. 14:15-3. First of all, the Kansas statute purported to vest in the "state charter board" a power to grant or withhold permission for foreign corporations, including those engaged solely in interstate commerce, to transact business within the state. See 217 U. S. 91 at 101-102, 30 S. Ct. 481 at 482-83, 54 L. Ed. 678 at 683. The New Jersey statute, in contrast, does not purport to give the Secretary of State such discretionary power. If the foreign corporation complies with the simple requirements of N. J. Rev. Stat. 14:15-3, he has a mandatory duty to issue a certificate that the corporation is authorized to transact business in New Jersey. Secondly, the Kansas statute conditions authorization on deposit by the foreign corporation of a percentage of its capital stock in the "permanent school fund." This Court had previously held that provision unconstitutional. See 217 U. S. 91 at 102, 30 S. Ct. 481 at p. 483, 54 L. Ed. 678, at p. 683. There is no such requirement in the New Jersey statute. And, thirdly, the disclosure requirements of the Kansas statute, which required the enumeration of stockholders, were far more onerous than those of the New Jersey law.

Moreover, since the decision of the *Pigg* and *Buck Stove* cases, this Court has recognized that there has been an increasing "tendency * * * toward sustaining states' regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce and to doing so by a new or renewed emphasis on facts and practical considerations rather than dogmatic logistic." This "tendency" was explicitly referred to by the New Jersey Trial Court.

Presumably, it is for these reasons that Eli Lilly itself has conceded that "the most objectionable feature of the New Jersey statute and the one directly in issue here is the sanction imposed for failure to obtain a certificate of authority—denial of access to the courts of the state." (Jurisdictional Statement, p. 13). The quoted statement in effect admits that merely requiring Eli Lilly to register as a foreign corporation would not of itself violate the Commerce Clause even if we were to assume that Ely Lilly's business in New Jersey is entirely in interstate commerce.

If New Jersey can constitutionally require that Eli Lilly should apprise the state of its presence and activities by registering with the New Jersey Secretary of State, can New Jersey enforce that requirement by barring plaintiff from maintaining its Fair Trade suit unless it registers? The State contends that such a bar does not violate the Commerce Clause because plaintiff's Fair Trade suit arises from local commerce—a local purchase and sale—and is solely a matter of state concern.

Eli Lilly has cited decisions of this Court which reversed dismissals of suits brought by unregistered foreign corporations which were doing business solely in interstate commerce, but all of those cases are distinguishable from the case at bar. All except one involved causes of action which—unlike the instant suit—were "so directly connected with [interstate commerce] and * * * so essential to its existence and continuance that the imposition of unreasonable conditions upon this right [to maintain such suits] must necessarily operate as a restraint or burden upon interstate commerce." See *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 202-203, 35 S. Ct. 57, 59 L. Ed. 193 (1914). Thus *International Textbook Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910); *Sioux Remedy Co. v. Cope*, *supra*; *Furst v. Brewster*, 282 U. S. 493, 51 S. Ct. 295, 75 L. Ed. 478 (1931); and *Dahnke-Walker Co. v. Bondurant*, 257 U. S.

282, 42 S. Ct. 106, 66 L. Ed. 239 (1921) were actions to collect the purchase price due to the various plaintiffs for the sale and delivery in interstate commerce of various commodities or services. These cases stand for the proposition that if a foreign corporation cannot sue in the courts of a state to collect the price of goods which it has shipped there in interstate commerce, then obviously the foreign corporation cannot continue such sales and interstate commerce must come to a halt. The dismissal of a Fair Trade suit which seeks to control the price at which local drug-stores sell pharmaceuticals to local consumers is clearly not a comparable interference with interstate commerce.

The one case cited by plaintiff in which this Court reversed the dismissal of a cause of action which had not arisen directly out of a transaction in interstate commerce was *Buck Stove and Range Co. v. Vickers*, 226 U. S. 205, 33 S. Ct. 41, 57 L. Ed. 189 (1912). That was a suit in tort under Kansas law to set aside a fraudulent conveyance. But the opinion of the Court in the *Buck* case does not hold that it was the dismissal of a suit upon a state-created tort which violated the plaintiff's constitutional rights. The opinion emphasizes that the abatement of the suit was error only because the Kansas statute which required the registration of foreign corporations was so onerous that as applied to foreign corporations doing business only in interstate commerce, the registration requirements themselves were an unconstitutional burden upon interstate commerce quite apart from the nature of the penalty provided for their enforcement. That case is inapplicable to the instant suit because the registration requirements with which Eli Lilly and Company has refused to comply are, as previously indicated, wholly innocuous.

It should be emphasized that the suit which was dismissed below was a suit under the "nonsigner provision" of the New Jersey Fair Trade Law. The purpose for which this suit was instituted was to regulate the prices

at which New Jersey drugstores could sell pharmaceutical products to New Jersey consumers. Legally and factually, this price-fixing suit is a matter of wholly local concern. Congress itself has expressly declared that neither the creation nor the enforcement of a statutory right of action against "nonsigners" under a state Fair Trade Law, "shall constitute an unlawful burden or restraint upon or interference with [interstate] commerce." 66 Stat. 632 (1952), 15 U.S.C.A. §45. Section 1 of the cited Act provides:

"That it is the purpose of this Act to protect the rights of states under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

This express Congressional recognition that Fair Trade pricing is completely a matter of state policy would make it anomalous indeed for this Court to hold that it is a violation of the Interstate Commerce Clause for a New Jersey statute to prohibit Eli Lilly from maintaining its Fair Trade suit.

Eli Lilly can continue its interstate business, the shipment of pharmaceuticals from Indiana to New Jersey wholesalers, regardless of whether it is permitted to maintain Fair Trade suits in New Jersey courts. The effect of the construction of N. J. Rev. Stat. 14:15-3 and 14:15-5 which has been adopted by the New Jersey Supreme Court is that Eli Lilly will be unable to sue in New Jersey courts

to enforce its minimum retail price maintenance program unless it registers as a foreign corporation. But price protection will still be available to it in New Jersey because under New Jersey law Fair Trade suits may be instituted by wholesalers or by retailers competing with the alleged Fair Trade violator as well as by the manufacturer itself. N. J. Rev. Stat. 56:4-6. See *Burstein v. Charline's Cut Rate*, 126 N. J. Eq. 560, 10 Atl. 2d 646 (Ch. 1940). Thus, despite its inability to prosecute Fair Trade suits in New Jersey courts unless it registers as a foreign corporation, Eli Lilly will still enjoy greater rights in this state than in the numerous states which do not have any effective Fair Trade Laws. Certainly the interstate Commerce Clause does not require that plaintiff's prosecution of state-created rights under New Jersey's Fair Trade Law be permitted to proceed in disregard of registration requirements in coexisting state statutes.

CONCLUSION

For all of the reasons stated in this brief, the State of New Jersey, Intervenor-Appellee, respectfully requests that this appeal be dismissed or, in the alternative, that the judgment below be summarily affirmed.

Respectfully submitted,

DAVID D. FURMAN,

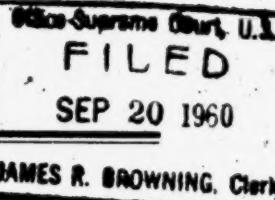
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 203.

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS.

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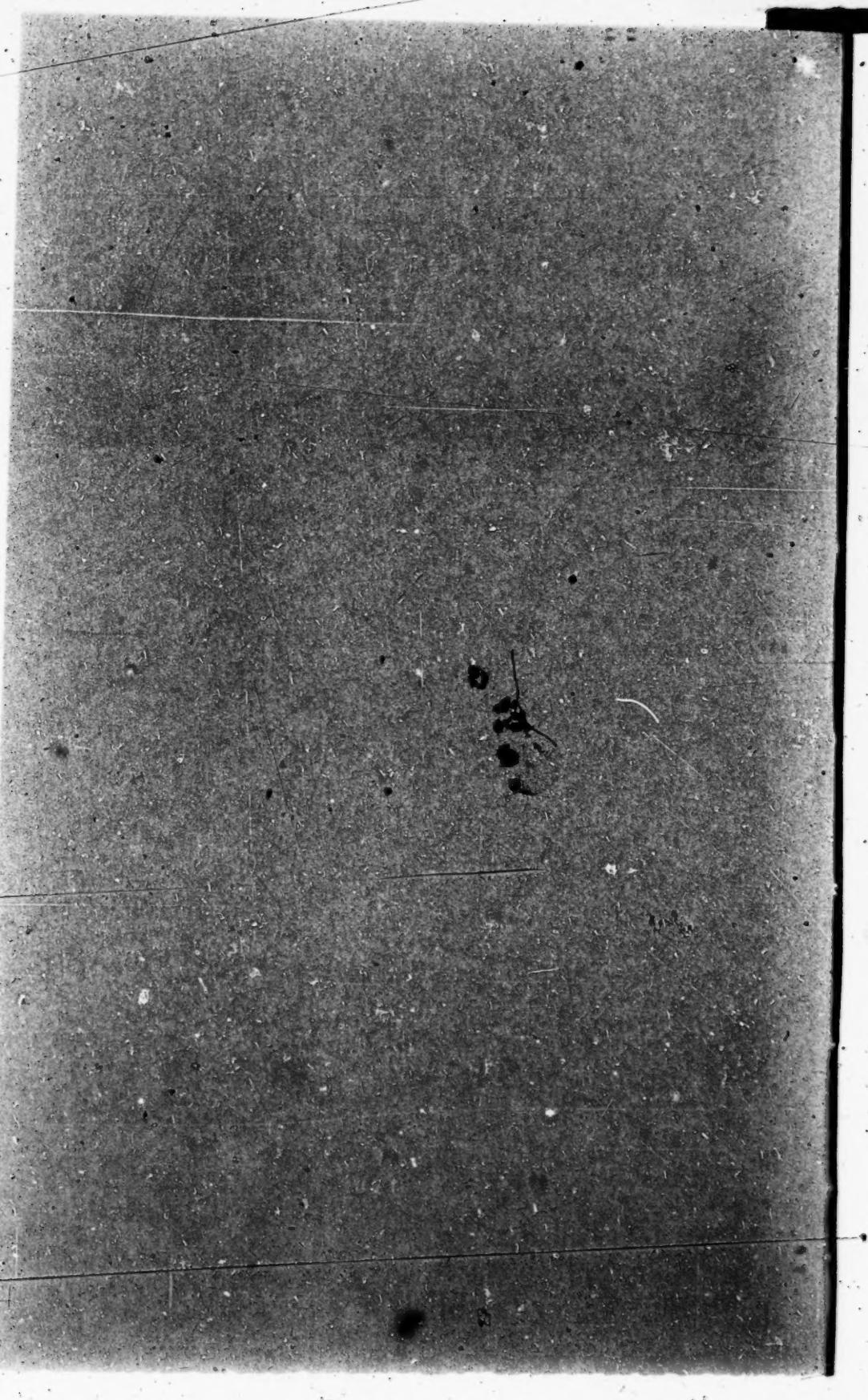


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SAY-ON-DRUGS, INC.,

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

**BRIEF IN OPPOSITION TO MOTIONS
TO DISMISS.**

This brief is submitted by appellant Eli Lilly and Company in opposition to separate Motions to Dismiss filed by appellees Sav-On-Drugs, Inc. and the State of New Jersey, intervenor.

Appellant commenced this action in the Superior Court of New Jersey for an injunction under the New Jersey Fair Trade Act. That court's dismissal of the action on the ground of appellant's failure to qualify to do business in New Jersey was affirmed by the New Jersey Supreme Court.

Appellees curiously seek to sustain the decision below by contradicting its major premise. The court below clearly held that appellant, even though doing only interstate business, could constitutionally be required to obtain the State's permission to carry on that business in New Jersey. How-

ever, appellees now argue for the first time that appellant is engaged in intrastate commerce in New Jersey. In addition, they contend that even if appellant is engaged solely in interstate commerce, the decision below does not contravene the Commerce Clause. These contentions will be discussed in order.

I.

Appellant Is Engaged Solely in Interstate Commerce in New Jersey and the Courts Below So Held.

Appellees' contention that Lilly is doing intrastate business in New Jersey is both contrary to the facts and in total disregard of the decisions of the Superior and Supreme Courts of New Jersey. Appellees point to nothing in the lower court's opinion which suggests a finding that appellant was doing an intrastate business in New Jersey. Had such a finding been made, it would have easily disposed of the case on the facts since appellant did not contest the constitutionality of qualification statutes as applied to corporations doing intrastate business. Clearly this was not the basis of the court's lengthy opinion devoted to the argument that despite the interstate nature of the appellant's business New Jersey could constitutionally require appellant to qualify under the New Jersey statute. To be sure, the court below held that appellant was "doing business" in New Jersey, but the business appellant does in New Jersey was recognized to be interstate, not intrastate.

Significantly, in their briefs before the New Jersey Supreme Court appellees did not argue that appellant was in intrastate commerce or that the lower court had ruled that it was. On the contrary, both appellees implicitly conceded that appellant was doing a solely interstate busi-

ness but contended that the statute by its terms applies to "any business" regardless of its nature and is constitutional as so applied.

Contrary to their position below, appellees evidently would now treat "doing business in New Jersey" as necessarily connoting intrastate commerce. But this begs the crucial question as to the *kind* of business done. Obviously there can be no interstate commerce without some local activity. In *International Textbook Co. v. Pigg*, 217 U. S. 91, 103-06 (1910), the state court had likewise found that the foreign corporation was "doing business" in Kansas. On appeal this Court expressly approved that finding, but went on to hold that the business was in interstate commerce and the statute unconstitutional as applied to the corporation. Similarly, the lower court here, having made the finding that appellant was "doing business", went on in part II of its opinion to consider the constitutional issue raised by appellant's contention that the New Jersey statute may not be applied to it because "it is engaged entirely in interstate commerce" (Opinion, *Juris. St.*, pp. 32-3). The court never disputed the fact that appellant's business was "entirely in interstate commerce." Had it done so, there would have been no necessity for it to deal with the constitutional issue.

In contending, contrary to the holding of the New Jersey courts, that appellant is engaged in intrastate commerce in New Jersey, the intervenor relies entirely upon *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918), which sustained a state tax on the local business of a corporation engaged also in interstate commerce. At the outset it should be noted that the *Cheney* case had nothing to do with the questions of corporate qualification and access to courts involved here. The difference between tax cases and qualification cases has long been recognized. See, e.g.,

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Isaacs, *An Analysis of Doing Business*, 25 Col. L. Rev. 1018, 1025 (1925). And soundly so. This Court has long been receptive to the claim that "interstate business must pay its way". *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, 259 (1919). Thus, in tax cases, there has been liberality in looking to some "local incident" upon which the state's power to tax could be upheld. E.g., *McGoldrick v. Berwind-White Co.*, 309 U. S. 33 (1940). This Court has been equally zealous, however, to protect the right of a foreign corporation in interstate commerce to have free access to the courts for enforcement of its rights. E.g., *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914).

But aside from this important distinction between tax and qualification cases, intervenor misstates the facts when it says that Lilly's activities in New Jersey are "identical" to those of the corporation in *Cheney*. They are quite different. The salesmen in *Cheney* were engaged in regular solicitation as agents for domestic wholesalers. The Supreme Judicial Court of Massachusetts had expressly found that

"The major part of the plaintiff's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in soliciting orders from domestic retailers. This is in substance the *business of providing agents* for the wholesalers." 218 Mass. 558, 575, 106 N. E. 310, 317 (1914) (emphasis supplied).

Here, on the other hand the court below found that

"It is the function of the detail men to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products" (Opinion, Juris. St., p. 29).

As to orders for wholesalers, the opinion below states that

"On an occasion, these detail men, 'as a service to the retailer,' may receive an order for plaintiff's products for transmittal to a wholesaler." (Opinion, Juris. St., p. 29).

There are thus three basic factual distinctions between the present case and *Cheney*: The orders here are (1) not solicited, (2) received only "on an occasion", not as a regular course of business, and (3) transmitted as a service to the purchasing retailer, not as agent for the selling wholesaler. Appellant's detail men act as agents for no one except appellant in New Jersey. Their function is to promote the sale of appellant's products in interstate commerce. This is the accepted method of advertising by ethical drug companies such as appellant, since they neither sell nor advertise directly to the consuming public, and the usefulness of this means of circulating information about drug products is widely recognized. See *Hoffmann-La Roche Inc. v. Schwegmann Bros. Giant Super Markets*, 122 F. Supp. 781, 782-83 (E. D. La. 1954). These activities are directly in aid of appellant's interstate business.

Promotion and advertising are fundamental to the conduct of American business today. No company can do a substantial interstate business without it. Regardless of the level at which they sell—whether to manufacturers, wholesalers, retailers or consumers—most companies engage in advertising and promotion at the retailer and consumer level to make their products known and increase their acceptance. If the mere fact of advertising and promotion were to be considered as doing a local business then the protection of the Commerce Clause would be withdrawn from virtually every interstate corporation in the nation.

This would be a startling innovation. It certainly is not compelled by the *Cheney* case, which dealt with regular solicitation of sales as agents for local wholesalers, not with mere promotional and informational activities incident to interstate sales. The fact that, as a courtesy, an occasional unsolicited order is transmitted to a wholesaler is too trivial and insubstantial to localize the essential interstate character of appellant's activities in New Jersey. Cf. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 461 (1959). The lower court plainly attached no significance to this fact.

Not only is *Cheney* distinguishable on the facts, but more recent authority limits the scope of the *Cheney* holding even on its own facts. In the landmark *Portland Cement* case, *supra*, which held that states may tax income derived from business activities exclusively in interstate commerce, this Court's opinion recited as to one of the corporations involved:

"... appellant's salesmen also contacted potential customers and users of cement products, such as builders, contractors, architects, and state, as well as local government purchasing agents. Orders were solicited and received from them, on special forms furnished by appellant, directed to an approved local dealer who in turn would fill them by placing a like order with appellant. Through this system appellant's salesmen would in effect secure orders for local dealers which in turn were filled by appellant in the usual manner." 358 U. S. at 454-55.

Despite this activity (including solicitation; not present here) this Court accepted the state court's finding that the corporation was engaged entirely in interstate commerce and went on to deal with the constitutional issue

which, of course, would not have been posed absent that finding.*

Moreover, following the *Portland Cement* decision, Congress enacted Public Law 86-272, 73 Stat. 555 (1959), which exempts from state taxation income derived not only from solicitation of orders to be approved and to be filled by shipment of goods from outside the state, but also from solicitation of orders for the benefit of a customer who in turn gives orders which are approved and filled by shipment from outside the state. In other words, Congress has expressly given immunity from state taxation to income derived from solicitation at a lower level than that at which the interstate shipment takes place. The legislative history shows a recognition by Congress of the importance of such activities in the conduct of many interstate businesses. See Senate Report No. 658, 86th Congress, 1st Session (1959).

In sum, it is clear that there is no basis for appellee's contention that appellant was engaged in intrastate commerce in New Jersey.

III.

The New Jersey Qualification Statute Is Unconstitutional as Applied to Appellant.

A. The privilege of engaging in interstate commerce cannot be granted or withheld by the states.

That state qualification statutes—regardless of their particular provisions—may not be applied to foreign corporations exclusively in interstate commerce has been settled

* This finding was necessary to the result, since the state statute imposed the tax only on corporations whose business within the state "consists exclusively of foreign commerce, interstate commerce, or both." See 358 U. S. at 453.

constitutional law for fifty years.* In posing the constitutional question in terms of the alleged lack of burdensomeness of the particular statute involved, appellees are diverting attention from the real question. The essential vice of the New Jersey statute, as applied to foreign corporations in interstate commerce, is that it deals with a matter not within the competence of the states—the exclusively federal right to engage in interstate commerce. As Mr. Justice Clark pointed out in the *Portland Cement* case:

"This Court has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a State . . ." (358 U. S. at 464).

Yet this is exactly what the New Jersey statute, as interpreted by the court below, purports to do: grant the privilege of doing an interstate business in New Jersey upon compliance with state-imposed conditions. It is true, as appellees state, that this Court has gone a long way in upholding some types of state regulation that incidentally affect interstate commerce, but it has never deviated from the rule of *Crutcher v. Kentucky*, 141 U. S. 47, 57 (1891) that "To carry on interstate commerce is not a franchise or a privilege granted by the State."

In the *Portland Cement* case, while sustaining the right of the states to tax income earned exclusively from inter-

* The decisions of this Court as well as of state courts (see *Juris. St.* pp. 6-9) established the principle so clearly that it was embodied in the Restatement of Conflict of Laws, in the following terms (Section 175):

"Under the Constitution of the United States, a State cannot require that a foreign corporation, as a condition of engaging within the State solely in interstate commerce, designate a principal place of business or file an annual statement of condition or satisfy certain standards in respect to its financial structure or condition."

state commerce, the Court emphasized its continued adherence to the principle that States could not tax the privilege of engaging in interstate commerce, previously reaffirmed in *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951). The *Spector* case had made clear that it was not the burdensomeness of the tax which offended the Commerce Clause but the fact that it was laid on a privilege that was not within the competence of the State to grant.* The fact that *Spector* and *Portland Cement* exist side by side demonstrates that this Court can and does give recognition to legitimate state action affecting interstate commerce while at the same time requiring that the States respect fundamental limitations placed on them by the Commerce Clause.

The cases cited by intervenor merely illustrate the difference between essentially local police regulation of particular industries, incidentally affecting interstate commerce, and the assertion of state power over the very privilege of engaging in *any* interstate commerce. In the one case, the test of constitutionality under the Commerce Clause is whether the regulation unduly burdens interstate commerce; in the other, the basic power to grant, deny, or condition the privilege is wholly lacking.

In the light of this well-settled distinction, the inapplicability of the cases cited by intervenor becomes clear. *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U. S. 177 (1938) dealt with a regulation limiting size and weight of vehicles on the state's own highways, a matter primarily within the police power of the state. So also,

* "The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for protection given by the State." *Spector Motor Service v. O'Connor*, 340 U. S. at 607. Mr. Justice Burton concluded in that case that to hold that "the federal privilege of carrying on exclusively interstate commerce" could not be taxed "gives lateral support to one of the cornerstones of our constitutional law. *McCulloch v. Maryland.*" (340 U. S. at 610.)

Panhandle Eastern Pipe Line Co. v. Michigan Commission, 341 U. S. 329 (1951) and *Robertson v. California*, 328 U. S. 440 (1946) involved state legislation aimed at local gas sales and deceptive insurance practices, in particular industries traditionally subject to close state supervision. It is further to be noted that Congress has left to the states the power to regulate local aspects of both these industries. Natural Gas Act, §1(b) 52 STAT. 821, 15 U. S. C. §717 et seq.; McCarran Act, 59 STAT. 33, 15 U. S. C. §§1001-15.

As for *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944), this case was cited in appellant's Jurisdictional Statement as an example of the legitimate application of a qualification statute to a foreign corporation doing an essentially local business, albeit one related to the process of foreign commerce. The brokerage company was not itself engaged in foreign or interstate commerce. Not some, but all of its activities took place within the state.* Obviously, if a corporation conducting activities entirely within a single state could claim the protection of the Commerce Clause merely because of some connection with interstate commerce, there would be very little left of state control over local affairs. Cf. *Williams v. Fears*, 179 U. S. 270 (1900); *Federal Compress Co. v. McLean*, 291 U. S. 17 (1934). The Court was careful to point out the distinction between the *Union Brokerage* case and *International Text-book Co. v. Pigg*, 217 U. S. 91 (1910), which did involve, as does the present case, a corporation actually engaged in commerce across the state lines. See 322 U. S. at 211. Thus,

* The Supreme Court of Minnesota found that:

"The business was transacted entirely within the borders of this state. It had nothing whatever to do with the actual importation or exportation of articles of commerce." *Union Brokerage Co. v. Jensen*, 215 Minn. 207, 220, 9 N. W. 2d 721, 727 (1943).

Union Brokerage represents no departure from the precedents cited by appellant.

B. No legitimate state interest justifies the application of qualification statutes to foreign corporations in interstate commerce.

That there is no necessity here to overrule established precedents in order to accommodate any significant need of the State was pointed out in the Jurisdictional Statement. The purpose of the qualification statute here involved was to obtain jurisdiction over foreign corporations. *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905). Yet, as both appellees admit, the New Jersey courts clearly can now obtain jurisdiction over foreign corporations under the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945) without the obtaining of any consent by means of this statute.*

While "burdensomeness" is not the issue, it may be noted that there is at least one highly burdensome aspect of compliance with the New Jersey statute. By exacting a general consent to suit, the New Jersey statute would subject corporations such as appellant to suits by non-residents on causes of action arising outside the State—suits which, in many if not all instances, would not be within the "minimum contacts" rule. This Court has on several occasions stricken down, as a burden on interstate commerce, the assertion of state jurisdiction over foreign corporations in interstate commerce in such situations. E.g., *Davis v. Farmers Co-op. Equity Co.*, 262 U. S. 312 (1923); see Note, 73 HARV. L. REV. 909, 983-87 (1960). Although under the

* Nor is the statute necessary to accomplish service of process, since New Jersey court rules provide for service on any servant of a foreign corporation, and when this cannot be done, by registered mail, return receipt requested, to the principal office of the foreign corporation. N. J. Rev. Rules 4:4-4(d).

Due Process Clause, the State of New Jersey can obtain jurisdiction in all instances where it is fair to do so, the effect of the statute here involved is to acquire, by forced consent, additional jurisdiction even where it is unfair to do so and where it may burden interstate commerce. Surely, deference to the states does not require such a sacrifice of the interests of corporations in interstate commerce.

Recognizing that the New Jersey statute is not needed by the state for the purpose for which it was enacted, the intervenor has strained to submit another rationale for the statute. The new theory is that New Jersey has "a right to be apprised of the presence of foreign corporations" in order to determine whether they are subject to its tax laws or regulatory statutes such as the Workmen's Compensation and Unemployment Compensation laws. It is questionable constitutional doctrine to sustain a statute, not on the basis for which the Legislature enacted it, but on a supposed new use to which it may be put. Moreover, there is nothing in the record to indicate that this statute is being used by state agencies for informational purposes. There is nothing to show that these "purposes" reflect anything more than the speculative fertility of the intervenor.

Furthermore, the State of New Jersey can implement its tax and regulatory statutes by direct requirements for information returns and reports without imposing conditions on the right to engage in interstate commerce. In fact, it has already done so. The New Jersey Tax Bureau requires a return to be filed whenever a corporation is doing business within the State. N.J. Corporation Tax Bureau Regs. 16:10-1.130. Similarly, the New Jersey Unemployment Compensation Law contains express requirements, enforced by penalties, for the filing of reports and returns, and the agency implementing this

law has power to require additional reports. N. J. REV. STAT. 43:21-11, 14. The Workmen's Compensation Law also provides for notice of compliance with its provisions and is enforced by criminal sanctions. N. J. REV. STAT. 34:15-73, 79.

Thus, this supposed need to rely upon the qualification statute is, we suggest, pure invention.

C. The no-suit sanction is independently invalid under the Commerce Clause.

Because of the fact that the no-suit sanction improperly deprives foreign corporations in interstate commerce of their right to obtain justice in state courts, appellant pointed out in its Jurisdictional Statement that even if the qualification feature of the statute were to be upheld, the no-suit sanction should be stricken as an inadmissible interference with interstate commerce. Cases such as *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914) and *Furst v. Brewster*, 282 U. S. 493 (1931) stressed the offensiveness of the no-suit sanction under the Commerce Clause, while prior cases such as *Pigg, supra*, and *Buck Stove Co. v. Fickers*, 226 U. S. 205 (1912) emphasized the unconstitutionality of the qualification requirement itself. The intervenor argues that if this Court should uphold the qualification requirement, it need not follow *Sioux* and *Furst* because the cause of action here is based on the state fair trade law rather than on a contract for goods sold in interstate commerce.* Of course, this Court should not even reach this question because the qualification requirement is unconstitutional in itself. But even on the assumption that

* Appellant is unaware of any case which has drawn a distinction on the basis of the cause of action sued upon. On the contrary, appellant cited eight recent cases which allowed fair trade suits despite failure to qualify. Juris. St. p. 9.

it is not, the intervenor's argument for sustaining the no-suit sanction is specious.

The premise of the argument is the assertion that fair trade is a "matter of wholly local concern", justifying a denial of enforcement to corporations in interstate commerce. This premise is simply not true. Moreover it sidesteps the relevant question under the Commerce Clause, which is not whether the cause of action is "local", but whether a denial of the right to sue would unduly hamper the business of corporations engaged in interstate commerce.

The supposed "locality" of fair trade is based, according to the intervenor, on the fact that Congress has exempted fair trade agreements and enforcement against "non-signers" from the antitrust laws. This reasoning, to say the least, is difficult to follow. By the same token, contracts for the sale of goods in interstate commerce, such as involved in the *Sioux* and *Furst* cases, would be entirely of local interest because their enforcement depends entirely on state law; there is no federal law that gives a cause of action for the breach of such a contract. Activities do not cease to be in or to affect interstate commerce merely because they are not regulated by Congress. Under the intervenor's reasoning, if Congress were to repeal the Clayton and Sherman Acts entirely, activities previously subject to them would no longer be in interstate commerce.

Appellant's fair trade program is an integral part of its interstate operations. On this very point the Supreme Court of New Jersey in another fair trade case has written as follows:

"The sales to the consumer on the local level are of the very essence of the interstate process. The retail market is the outlet for goods distributed in

interstate commerce under a uniform price formula designed, as just said, to afford nationwide protection of plaintiff's good will. There is no discernible line of separation between the interstate and the intrastate operation. It is an integrated whole." *Johnson & Johnson v. Weissbard*, 11 N. J. 552, 95 A. 2d 403, 406 (1953).

And the Massachusetts Supreme Judicial Court recently stated in *Remington Arms Co. v. Lechmere Tire & Sales Co.*, Mass., 158 N. E. 2d 134, 139 (1959):

"These [fair trade] contracts were made in protection of the good will of the plaintiff's interstate business. . . . The activities of Parker, the field agents, or the professional shoppers are a part of the plaintiff's interstate business and a necessary prelude to court enforcement. . . . Resort to the courts similarly is not to be regarded as intrastate business. *Sioux Remedy Co. v. Cope*, 235 U. S. 197."

As stated in these cases, the legal basis for fair trade is the protection that it affords to the trade mark and good will of the manufacturer, which enhance the value of its goods distributed in interstate commerce. The fact that Congress removed fair trade from the scope of the antitrust laws indicates, not that it was indifferent to the plight of the manufacturer but, on the contrary, that it considered these interests to be deserving of protection. The intervenor's construction would result in a discrimination against corporations in interstate commerce in the enforcement of fair trade while granting such protection to local businesses.*

* As if to compensate for the weakness of its argument, the intervenor offers appellant the consolation that it might still enjoy some measure of fair trade protection in New Jersey since wholesalers and retailers are also permitted by the fair trade law to bring enforcement actions. But if this were adequate protection, appellant would not have found it necessary to institute more

Moreover, the essential inquiry should not be whether the suit is based on a local cause of action, but whether failure to entertain the action would result in harm to interstate business. The bulk of legal remedies on which business concerns rely to protect their interests, such as trade libel, interference with contracts, unfair competition, replevin, and disclosure of trade secrets, are state-created. If the intervenor's contention were upheld, New Jersey would be able to deny enforcement for all these actions.* As a corporation in interstate commerce, appellant is in New Jersey "for all the legitimate purposes of such commerce." *Sioux Remedy Co. v. Cope, supra*, at 203-04. Without access to the courts to enforce its legal rights growing out of that commerce, whether those rights are state-created or not, the conduct of appellant's interstate business in New Jersey would be placed in serious jeopardy.

Furthermore, there is no rational connection between the no-suit sanction and the "information" rationale now suggested for the qualification requirement. Appellant is not aware of any other type of tax or regulatory statute, state or federal, which is enforced by barring access to the courts. The federal government has collected billions under its income tax and social security laws without having sought from Congress the power to deny tax delinquents

than 30 fair trade suits in New Jersey in recent years nor, indeed, to prosecute this appeal. Obviously, appellant cannot rely solely on others, with interests different from appellant's, to protect its valuable good will and trade marks. See *Carter Products Inc. v. Alexander's Dept. Stores Inc.*, 1960 CCH Trade Cases ¶69,779 (Sup. Ct. N. Y. Co.).

* The New Jersey retaliatory statute, N. J. Rev. Stat. 14:15-5, adopts the Indiana corporation statute, Burns Indiana Stat. Ann. 25-314, which bars suits in all types of actions for failure to qualify. See Opinion, Juris. St. pp. 36-38. Under the *Erie* doctrine, in diversity cases the federal courts would also be closed. *Woods v. Interstate Realty Co.*, 337 U. S. 535 (1949).

access to the federal courts. In the *Portland Cement* case this Court was careful to point out, in consonance with prior cases, that the state tax which it upheld could be enforced "only through ordinary means," 358 U. S. at 462. Cf. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888).

In considering whether this sanction offends the Commerce Clause, it is important to note that the statute provides another sanction by which it can be enforced. Under N. J. REV. STAT. 14:15-6 the Attorney General is authorized to bring a legal action to impose a penalty of two hundred dollars (\$200) for each violation of the statute by an unqualified foreign corporation. Thus, the state does not have to rely upon the no-suit sanction and has the power to enforce the qualification requirement by direct and more appropriate action. The existence of this rational and more suitable alternative (cf. *Dean Milk Co. v. Madison*, 340 U. S. 349, 354 (1951)) removes any justification for conferring a gratuitous benefit on a private party and denying justice to another.

Conclusion.

Appellant has shown that both the qualification requirement and the no-suit sanction as here applied are violative of the Commerce Clause of the Constitution. The decision below being in error, the motions to dismiss should be denied and probable jurisdiction noted.

Respectfully submitted,

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JAMES R. SCOTT, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 203.

ELI LILLY AND COMPANY,

Appellant.

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR APPELLANT ELI LILLY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR APPELLANT ELI LILLY AND COMPANY.

Opinions Below.

The opinion of the Supreme Court of New Jersey is reported in 31 N. J. 591, 158 A. 2d 528 (R. 47). The opinion of the Superior Court of New Jersey, Chancery Division, is reported in 57 N. J. Super. 291, 154 A. 2d 650 (R. 30).

Jurisdiction.

The judgment of the Supreme Court of New Jersey was entered on March 7, 1960 (R. 48). Notice of appeal was filed in that court on May 2, 1960 (R. 49). Probable jurisdiction was noted by this Court on October 17, 1960 (R. 52). Jurisdiction of this appeal rests on 28 U. S. C. §1257 (2).

since there is drawn in question the validity of a New Jersey statute under the Commerce Clause of the United States Constitution and the decision below was in favor of its validity.

Constitutional Provision and Statutes Involved.

Article 1, Section 8 of the Constitution of the United States: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. . . ."

The following sections of the New Jersey Revised Statutes are set forth in the Appendix hereto: Section 14:15-3, 4, 5, 6 and 7; Section 14:16-1; and Section 14:6-2.

Question Presented.

Is a state statute repugnant to the Commerce Clause (Article I, Section 8) of the Constitution of the United States when applied to deny to a foreign corporation the right to engage in interstate commerce in the state, and to deny it access to the courts of the state, unless and until it obtains from the state a certificate of authority and subjects itself to all the requirements and obligations incident to domestication?

Statement.

This suit was commenced by appellant in the Superior Court of New Jersey, Chancery Division, to enjoin appellee's violations of the New Jersey Fair Trade Act, N. J. Rev. Stat. 56:4-3, *et seq.* Appellant is an Indiana corporation which manufactures and sells pharmaceutical products. Appellant's products are manufactured entirely in the State of Indiana and are sold to wholesale distribu-

tors in interstate commerce throughout the United States, including the State of New Jersey (R. 27). Appellant does not sell to retailers. It maintains no warehouse or stock of goods in New Jersey nor does it own or lease any property there. All its sales to New Jersey distributors are made under contracts entered into in Indiana (R. 27).

Appellant's activity in New Jersey is limited to promotional and informational work by employees who do not accept orders for products (R. 27). Appellant employs a "District Manager" who leases an office in Newark for which he is reimbursed by appellant (R. 28). Appellant's name appears on the door of this office (R. 23). The District Manager supervises the work of 18 detail men whose function is to visit physicians, hospital personnel and pharmacists to acquaint them with, and to promote the use of, appellant's products (R. 29). They do not solicit or accept orders from anyone. Occasionally, as a service to a retail druggist, they may transmit to a wholesaler an order for appellant's products which the wholesaler may fill if it wishes. The detail men make available to the druggists free advertising and promotional material. Occasionally they examine the retailer's stocks and may recommend the enlargement of his available supply of appellant's products (R. 29).

As part of its nationwide program of promoting its trademarks, name and good will, appellant has entered into a number of contracts, made in Indiana, with New Jersey drug retailers by which the latter agree not to sell appellant's products at less than the prices established by appellant as permitted by the New Jersey Fair Trade Act, N. J. Rev. Stat. 56:4-3 *et seq.*, and the McGuire Act, 66 Stat. 632 (1952), 15 U. S. C. §45 (1958) (R. 1-2, 27, 41). Under these statutes, all retailers having notice of the prices so established are required to observe them. Appellant has obtained

more than 30 injunctions in New Jersey state courts against retailers who have willfully violated appellant's fair trade prices (R. 3-5).

The present suit was brought to enjoin fair trade violations by appellee, Sav-On Drugs, Inc., a New Jersey corporation operating retail drug stores in that state. Appellee moved to dismiss the complaint on the ground that appellant was a foreign corporation transacting business in New Jersey without a certificate of authority from the Secretary of State and was therefore barred by New Jersey Rev. Stat. 14:15-3 and 14:15-4 from suing in the courts of the state (R. 22). In opposition to this motion, appellant contended that the application of the New Jersey statute to it would conflict with the Commerce Clause of the United States Constitution since its business in New Jersey is entirely in interstate commerce (R. 34, 38).

The trial court granted the motion to dismiss, finding that appellant was transacting business in the state within the meaning of the statute, and that, despite the interstate character of this business, the statute was constitutional as applied to appellant (R. 34-41). On appeal the Supreme Court of New Jersey affirmed the judgment, resting its decision on the opinion of the lower court (R. 47). Because of the attack on the constitutionality of the New Jersey statute, the State of New Jersey, through its Attorney General, intervened on appeal pursuant to New Jersey court rules.

Summary of Argument.

I.

A. The decision below conflicts with the long-standing constitutional principle that foreign corporations cannot be required by a state to obtain its permission to engage in interstate commerce within the state. *Crutcher v. Kentucky*,

141 U. S. 47 (1891). State qualification statutes such as the New Jersey statute involved here, imposing conditions on the right to engage in interstate commerce and the right to sue in state courts in furtherance of that commerce, have always been held to constitute a regulation of commerce forbidden by the Commerce Clause. *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921); *Furst v. Brewster*, 282 U. S. 493 (1931).

Except for New Jersey, the states are unanimous in recognizing this fundamental limitation on their power. Even New Jersey respected the limitation until this case. American business concerns throughout the country have for many years formulated their policies and methods in reliance on the unequivocal adherence to this rule by this Court and the courts of the states. No showing has been made of any legitimate state interest which would warrant overruling a half-century of constitutional decisions.

B. The court below confused two entirely separate lines of constitutional precedents. It failed to recognize that the assertion of state power over the very right to engage in interstate commerce stands in an entirely different category from state police power regulation of matters vital to local health, safety or welfare but incidentally affecting interstate commerce. Regulation of the latter type is permitted if it does not unduly burden or discriminate against interstate commerce, but regulation or taxation of the right itself is completely beyond the power of the state. Compare *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938) with *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951). The very case relied on by the court below as rendering the principle of *International Textbook Co. v. Pigg*, *supra*, obsolete emphasized this distinction again and again. *Northwestern States*

Portland Cement Co. v. Minnesota, 358 U. S. 450, 458, 462, 463-464 (1959).

C. New Jersey has no legitimate need to apply the qualification statute to foreign corporations in interstate commerce. The need which gave rise to the statute in 1894, to acquire jurisdiction over foreign corporations otherwise immune from suit, has long since disappeared. State court jurisdiction over foreign corporations, even when engaged solely in interstate commerce, has been obtainable under the "presence" test since the decision in *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914). It is now even more easily obtained under the "minimum contacts" rule. *International Shoe Co. v. Washington*, 326 U. S. 310 (1945). The court below evidently considered the *International Shoe* case an authority for its decision here, but the important constitutional difference between subjecting foreign corporations to suit and requiring them to qualify to do interstate business was pointed out as long ago as 1914 in the *International Harvester* case.

The New Jersey statute does in fact burden interstate commerce. Qualification under it subjects foreign corporations in interstate commerce to state court suits which may not fall within the "minimum contacts" rule, such as suits by non-residents on causes of action arising outside the state. In addition, New Jersey tax regulations provide that a foreign corporation holding a certificate of authority to do business in the state automatically acquires taxable status for purposes of the corporate franchise tax.

If the states are permitted to impose their own conditions on the right to engage in interstate commerce, compliance with the varied and recurring requirements of state qualification statutes would result in cumulative burdens on corporations doing interstate business in numerous states.

II.

Appellees' contention that appellant is engaged in intra-state commerce in New Jersey raises a new argument and is in conflict with their position below which the court adopted. Accordingly, it need not be considered by this Court. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 434-35 (1907).

Even if the contention were timely, it would make no difference here. The present suit is for the protection of appellant's interstate business and, as shown by the *Sioux* and *Furst* cases, could not be barred even if appellant were in fact doing some business of an intrastate character.

In any event, appellant is engaged only in interstate commerce in New Jersey. It sells only to wholesale dealers in interstate commerce, and maintains no warehouse or stock of goods in the state. Its activity in New Jersey is limited to the promotional and informational work of appellant's detail men which is in aid of that interstate business and does not constitute the doing of a local business in New Jersey. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (1887); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 437 (1938); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959); *Ford Motor Co. v. FTC*, 120 F. 2d 175 (6th Cir. 1941).

ARGUMENT

I.

New Jersey Cannot Constitutionally Require Foreign Corporations to Qualify to Do Interstate Business in the State.

A. The Right to Engage in Interstate Commerce May Not Be Subjected to State-Imposed Conditions.

The court below disregarded the established constitutional rule that a foreign corporation cannot be required by a state to obtain permission to engage in interstate commerce within the state. While foreshadowed by even earlier cases, this rule has been a cornerstone of our constitutional law ever since *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

In the *Crutcher* case a Kentucky statute required agents of express companies not incorporated in Kentucky to obtain a license to do business within the state. An agent of a foreign corporation carrying on interstate business within Kentucky was convicted and fined for failure to obtain such a license. This Court reversed the conviction, holding that the licensing requirement was a "regulation of interstate commerce . . . a subject which belongs to the jurisdiction of the national and not the state legislature." (141 U. S. at 57) The Court added:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their busi-

ness, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." (141 U. S. at 57)

This is a principle from which the Court has never deviated in the seventy years since *Crutcher* was decided, as the following brief review of subsequent decisions will show.

In *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910), on the authority of *Crutcher*, this Court reversed a Kansas decision barring suit by a foreign corporation in interstate commerce for failure to comply with a statute requiring foreign corporations to apply for a certificate of authorization to do business in the state. The textbook company, through an agent who maintained an office in the state, engaged in regular solicitation of students for correspondence courses which were mailed to the students from the company's main offices in Pennsylvania. While agreeing with the state supreme court that the corporation was "doing business" in Kansas, the Court held that the business was entirely in interstate commerce and that the statute, in imposing conditions upon the right of a corporation to do interstate business, "is a regulation of interstate commerce and directly burdens such commerce." (217 U. S. at 111). Commenting on the harshness of barring access to state courts, Mr. Justice Harlan reiterated the statement the Court had made in *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, 148 (1907):

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." (217 U. S. at 112).

That same year, on the authority of the *Pigg* case, this Court reversed *per curiam* two state court decisions which had held qualification statutes of Wisconsin and Vermont applicable to corporations engaged in interstate commerce. *International Textbook Co. v. Peterson*, *International Textbook Co. v. Lynch*, 218 U. S. 664 (1910). In the light of the attempt of the court below to distinguish the Kansas statute involved in the *Pigg* case as "more onerous" than the New Jersey statute involved here, it is significant that the Wisconsin statute invalidated in the *Peterson* case required even less than the New Jersey statute. Wisconsin required only the filing of the corporate charter, appointment of the Secretary of State as agent for service of process, and a filing fee of \$25.*

Two years later, when the Kansas courts attempted to bar four foreign corporations in interstate commerce from suing to set aside a fraudulent conveyance for failure to comply with the Kansas qualification statute, this Court again held that the Commerce Clause invalidated such an application of the statute. *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912).

Sioux Remedy Co. v. Cope, 235 U. S. 197 (1914), reversed a South Dakota decision which barred suit on an interstate transaction for failure of the foreign corporation to comply with a South Dakota statute requiring a foreign corporation to qualify not only to do business in the state but also to sue in state courts. The South Dakota court had held that while the state could not condition the right to make interstate

* Wisc. Stat. 1898, §1770 b. It is clear from the *Peterson* and subsequent cases that the Court has considered all qualification statutes, regardless of their particular provisions, unconstitutional as applied to corporations in interstate commerce. This is the interpretation given the decisions by textbook commentators. E.g., 17 FLETCHER, CORPORATIONS 504 (rev. vol. 1960); RESTATEMENT, CONFLICT OF LAWS §175 (1934).

sales on compliance with the statute, it could so condition the right to sue in state courts for the purchase price. In holding to the contrary, this Court stated that a corporation engaged in interstate commerce "may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce", including suits to enforce rights arising from interstate commerce. While recognizing that a state can regulate the procedure of its courts, such as requiring security for costs and the like, the Court held that the conditions imposed "have no natural or reasonable relation to the right to sue which they are intended to restrict." (235 U. S. at 203-04, 205).

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921), a foreign corporation which had contracted in Kentucky to purchase wheat there for shipment to Tennessee had been barred by the Kentucky courts from suing to enforce the contract by reason of its failure to comply with the state qualification statute. This Court reversed, holding the application of the statute invalid because the "transaction was a part of interstate commerce; in which the plaintiff lawfully could engage without any permission from the state of Kentucky." (257 U. S. at 292-93)

In *Furst v. Brewster*, 282 U. S. 493 (1931) a partnership acting for an unqualified foreign corporation had contracted to ship goods to Brewster in Arkansas for sale on the local market. In a suit to recover the agreed price from Brewster, the state court had found that the contract was one of agency, rather than of sale, and that the foreign corporation was therefore engaging in local commerce through its agent Brewster, thus making the contract unenforceable under the qualification statute. On appeal, this Court held that even if Brewster were the agent of the foreign corporation in making local sales, the contract between Brewster and the foreign corporation was in inter-

state commerce and enforceable despite the corporation's failure to qualify. The *Furst* case makes clear that a foreign corporation may not be denied access to state courts to enforce rights arising from interstate commerce even if it is also doing intrastate business. Indeed, the *Crutcher* case had already held, and the *Pigg* case reiterated, that a state qualification statute imposing conditions on the right to transact interstate business is unconstitutional even though the particular corporation also does some intrastate business (141 U. S. at 59; 217 U. S. at 110).

These cases, from *Crutcher* to *Furst*, dealing with a variety of statutes and diverse factual situations, have established as bedrock constitutional law that state qualification statutes cannot condition the right to engage in interstate commerce or to bring suits in state courts in furtherance of that commerce. Unlike other Commerce Clause cases which have caused sharp division in this Court, the cases holding qualification statutes inapplicable to interstate business have not produced substantial disagreement or dissent. Most were unanimous decisions on the constitutional issue and the last one, *Furst v. Brewster*, carried the assent of Justices who in cases of state action having less fundamental impact on interstate commerce did not hesitate to defend state regulation challenged under the Commerce Clause. E. g., *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927) (Holmes, Brandeis and Stone, JJ., dissenting).

The continuing validity of the principle that qualification statutes cannot be applied to interstate commerce has been expressly recognized in cases which permitted the licensing of individuals and corporations engaged in localized intrastate businesses having some relation to interstate or foreign commerce. *California v. Thompson*, 313 U. S. 109 (1941); *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944).

In the *Thompson* case, the Court sustained a California statute providing for licensing of local transportation agents who arranged for intrastate or interstate transportation. The Court, overruling the *Di Santo* decision, pointed out that the agents to whom the statute applied were not themselves engaged in interstate transportation and distinguished the *Crutcher* and *Dahnke-Walker* cases as involving the imposition of statutory conditions on the right to engage in interstate commerce. (313 U. S. at 114-15)

The Court again emphasized this distinction in the *Union Brokerage* case, which upheld the Minnesota qualification statute as applied to a foreign corporation doing a customs brokerage business entirely within the state. The Minnesota Supreme Court had recognized that the qualification statute was inapplicable to corporations engaged in interstate or foreign commerce. It found, however, that the corporation's brokerage business was intrastate, as the corporation had its office and all its records in the state, conducted all its business entirely within the borders of the state, and "had nothing whatever to do with the actual importation or exportation of articles of commerce" (215 Minn. 207, 220, 9 N. W. 2d 721, 727). In affirming, this Court repeatedly called attention to the fact that the corporation's business was localized in the state and distinguished the *Pigg* and *Dahnke-Walker* cases as involving corporations engaged in "unitary interstate" transactions across state lines. (322 U. S. at 208, 210, 211)

Until the decision below there has been unanimous recognition by the states themselves of the constitutional bar against applying qualification statutes to foreign corporations engaged only in interstate commerce. Of all the 50 states New Jersey stands alone. Indeed, New Jersey itself previously recognized its lack of the power it here asserts. *Federal Schools, Inc. v. Sidden*, 14 N. J. Misc. 892,

188 Atl. 446 (1936). In 16 states the constitutional limitation is expressed in the statute itself.* All other states which have spoken on the subject have required by judicial decision that their qualification statutes be construed as incorporating the limitation.**

- * Alaska—Comp. Laws Ann. §36-2A-141 (1958).
- California—Corporations Code §6403
- Connecticut—Gen. Stat. §33-397 (Supp. 1959)
- Delaware—Code Ann., tit. 8, §§341, 343, 344 (1953)
- Hawaii—Rev. Laws §§174-1, 174-7.5 (Supp. 1957)
- Iowa—Code Ann. §496 A. 103 (Supp. 1960)
- Maine—Rev. Stat. Ann. ch. 53, §127 (1954)
- Maryland—Ann. Code art. 23, §§ 88, 90, 91 (1957)
- North Carolina—Gen. Stat. §§55-131 (1960)
- North Dakota—Rev. Code §10-2201. (Supp. 1957)
- Ohio—Rev. Code Ann. §1703.02 (Page 1954)
- Oregon—Rev. Stat. ch. 57 §57.655 (1959)
- Pennsylvania—Stat. Ann. tit. 15, §2852-1001 (1958)
- Tennessee—Code Ann. §48-902 (1955)
- Texas—Bus. Corp. Act, art. 8.01 (1956)
- Washington—Rev. Code §23.52.020 (1958)
- ** Alabama—*Gilliland & Echols Farm Supply & Hatchery v. Credit Equip. Corp.*, 269 Ala., 112 So. 2d 331 (1959).
- Arizona—*Weber Showcase & Fixture Co. v. Co-Ed Shop*, 47 Ariz. 415, 56 P. 2d 667 (1936).
- Arkansas—*Sillin v. Hessig-Ellis Drug Co.*, 181 Ark., 386, 26 S. W. 2d 122 (1930).
- Colorado—*Savage v. Central Elec. Co.*, 59 Colo. 66, 148 Pac. 254 (1915).
- Florida—*Stevens-Davis Co. v. Stock*, 141 Fla. 714, 193 So. 745 (1940).
- Georgia—*Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S. E. 120 (1923).
- Idaho—*New Idea Spreader Co. v. Satterfield*, 45 Idaho 753, 265 Pac. 664 (1928).
- Illinois—*Air Conditioning Training Corp. v. Majer*, 324 Ill. App. 387, 58 N. E. 2d 294 (1944).
- Indiana—*Vilten Mfg. Co. v. Evans*, 86 Ind. App. 144, 154 N. E. 677 (1927).
- Kentucky—*Webb v. Knoxville Glass Co.*, 217 Ky. 225, 289 S. W. 260 (1926).
- Louisiana—*Reynolds Metal Co. v. T. L. James & Co.*, 69 So. 2d 630 (Ct. App. La. 1954).

Appellees now ask this Court to overrule decisions on which American business has placed reliance for over half a century. So serious a step calls for a showing of most compelling reasons. As will be shown in B and C below, nothing approaching such a showing has been made.

Maine—*F. S. Royster Guano Co. v. Cole*, 115 Me. 387, 99 Atl. 33 (1916).

Massachusetts—*Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959).

Michigan—*Cleveland Cooperage Co. v. Detroit Milling Co.*, 235 Mich. 57, 209 N. W. 144 (1926).

Minnesota—*Weco Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. Minn. 1960).

Mississippi—*Smith v. J. P. Seeburg Corp.*, 192 Miss. 563, 6 So. 2d 591 (1942).

Missouri—*Superior Concrete Accessories, Inc. v. Kemper*, 284 S. W. 2d 482 (Sup. Ct. Mo. 1955).

New Hampshire—*Pennsylvania Rubber Co. v. Brown*, 83 N. H. 336, 143 Atl. 703 (1928).

New Mexico—*Abner Mfg. Co. v. McLaughlin*, 41 N. M. 97, 64 P. 2d 387 (1937).

New York—*Brooks Transp. Co. v. Hillcrea Export & Import Corp.*, 106 N. Y. S. 2d 868 (Sup. Ct. N. Y. 1951).

Ohio—*McClarran v. Longdin-Brugger Co.*, 24 Ohio App. 434, 157 N. E. 828 (1926).

Oklahoma—*Sooner Beverage Co. v. Heileman Brewing Co.*, 194 Okla. 252, 150 P. 2d 72 (1944).

Rhode Island—*Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958).

South Carolina—*State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946).

South Dakota—*Wyman, Partridge Holding Co. v. Lowe*, 65 S. D. 139, 272 N. W. 181 (1937).

Utah—*William C. Moore & Co. v. Sanchez*, 6 Utah 2d 309, 313 P. 2d 461 (1953).

Vermont—*Aetna Chem. Co. v. Spaulding & Kimball Co.*, 98 Vt. 51, 126 Atl. 582 (1924).

Washington—*Portland Ass'n of Credit Men, Inc. v. Earley*, 42 Wash. 2d 273, 254 P. 2d 758 (1953).

West Virginia—*United Shoe Repairing Mach. Co. v. Carney*, 116 W. Va. 224, 179 S. E. 813 (1935).

Wisconsin—*Bulova Watch Co. v. Anderson*, 270 Wisc. 21, 70 N. W. 2d 243 (1955).

Wyoming—*Creamery Package Mfg. Co. v. Cheyenne Ice Cream Co.*, 55 Wyo. 277, 100 P. 2d 116 (1940).

B. The Court Below and the Appellees Have Confused Two Entirely Separate Lines of Constitutional Decisions.

The only reason given by the court below for disregarding the controlling decisions of this Court on the constitutional issue is the mistaken notion that the "trend and philosophy of the more recent cases" in this Court indicate an abandonment of its prior rulings. This error evidently stemmed from the court's failure to distinguish between the cases forbidding state regulation or taxation of the right to engage in interstate commerce and the entirely different body of decisions which have long permitted state police power regulation of essentially local matters having an incidental effect on interstate commerce. See *Shafer v. Farmers Grain Co.*, 268 U. S. 186, 199 (1925).

The only case cited by the court below as showing this "trend" was *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959). But that case, while upholding state taxation of the net income of foreign corporations in interstate commerce, reiterated the Court's adherence to the rule that the privilege of engaging in interstate commerce cannot be taxed under any circumstances. The Court stated:

"This Court has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a state, and that the assertion of state power to tax the 'privilege' is therefore a forbidden attempt to 'regulate' interstate commerce." (358 U. S. at 464)

This rule had long prevailed even before it was so unequivocally restated in *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951) and has been applied many times since, as for example in a case decided on the same day as the *Portland Cement* case. *Railway Express Agency v. Virginia*,

358 U. S. 434 (1959). It was repeated once again only last Term. *Scripto Inc. v. Carson*, 362 U. S. 207, 212 (1960). As the *Spector* case made clear, the assertion of state power over the privilege of engaging in interstate commerce is invalid regardless of the burdensomeness of the particular imposition:

"Neither the amount of the tax nor its computation need be considered by us in view of our disposition of the case. The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for the protection given by the State." (340 U. S. at 607.)

State regulation of local matters incidentally affecting interstate commerce stands on a different footing. State health, safety and welfare regulation of matters of vital local concern, directed at particular abuses or conditions within the state, has always been upheld when its effect was not unduly burdensome on interstate commerce. Local legislation of this kind cannot be invalidated merely because of incidental effects on interstate commerce, since virtually all state police regulation has some such effects. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938). Even in this area, if the effects on interstate commerce are unduly burdensome or discriminatory, the regulation is invalid—particularly if alternative measures are available to meet the state's need. *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959); *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951).

Contrary to the implication of the court below, this constitutional view of local police regulation is not a recent trend, but has prevailed from the earliest times.

In the *Crutcher* case itself the Court stated:

"It is also within the undoubted province of the state legislature to make regulations . . . with regard to

all operations in which the lives and health of the people may be endangered, even though such regulations affect to some extent operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid." (217 U. S. at 61)

Cases cited by appellees in their motions to dismiss this appeal further illustrate these areas of permissible local regulation. *Panhandle Eastern Pipe Line Co. v. Michigan Commission*, 341 U. S. 329 (1951) and *Robertson v. California*, 328 U. S. 440 (1946) involved state regulation of particular industries vitally affecting the welfare of local citizens and traditionally subject to close state supervision and licensing—local gas sales and insurance solicitation.

In the *Panhandle* case the Court emphasized that the state regulation was concerned only with an "essentially local" aspect of the interstate pipeline business—direct sales requiring the utilization of local facilities in competition with a local public utility regulated by the state. The right of the pipeline company to enter the state to sell in interstate commerce to the local utility was not questioned. As to the local industrial sales, however, the Court pointed out that under the Natural Gas Act, §1(b), 52 Stat. 821 (1938), 15 U. S. C. §717 (1958), "direct sales for consumptive use were designedly left to state regulation." (341 U. S. at 334)

In the *Robertson* case, licensing of foreign insurance companies and their agents was part of a statutory scheme for the regulation of local insurance sales which was "designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp

practice."* (328 U. S. at 447) The Court based the state's power to license foreign insurance companies on its exclusionary power over "fraudulent or unsound insurance," which it analogized to the long-recognized police power to exclude diseased cattle and other dangerous commodities. (328 U. S. at 459) Since the states have no exclusionary power over interstate commerce as such, state regulation of the *Robertson* type, aimed at a particular evil in a particular industry, is not comparable to the power asserted by New Jersey here to license any and all interstate commerce by any and all foreign corporations.

South Carolina State Highway Dep't v. Barnwell Bros., 303 U. S. 177 (1938), also cited in the motions to dismiss, dealt with a safety regulation limiting the size and weight of vehicles on state highways, a plain exercise of the police power of the state. As this Court pointed out: "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways." (303 U. S. at 187) It was stressed that the highway regulation permissibly encompassed interstate commerce "because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states." (303 U. S. at 189) The Court also emphasized that the fundamental test of state power under the Commerce Clause was whether "the state legislature in adopting regulations such as the present has acted within its province." (303 U. S. at 190) It has never been considered within the province of

* Insurance had long been regulated by the states, and Congress expressly provided that such regulation should continue as to interstate companies following the decision in *United States v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533 (1944). McCarran Act, 59 Stat. 33 (1945), 15 U. S. C. §1011 (1958). As indicated in the *South-Eastern Underwriters* case, in view of the long history of state regulation in this instance its continuance might have been permitted even in the absence of the McCarran Act. (322 U. S. at 548-49)

a state legislature to decide whether corporations shall engage in interstate commerce within the state. *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

The distinction between state licensing of interstate commerce and state police regulation was recently stressed by this Court in *Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U. S. 77 (1958). There this Court denied to the City of Chicago the power to license connecting motor vehicle service between railroad terminals, an integral part of interstate transportation authorized by federal legislation, while recognizing that the city could regulate the operation of the vehicles and subject them to traffic and safety laws. (357 U. S. at 88) Similarly, appellant here does not claim immunity from state police regulation, but merely asserts that its right to carry on interstate commerce in New Jersey is not subject to "leave from local authorities." (*Id.* at 87)

The prohibition against direct regulation of interstate commerce by the states remains fundamental. The Court stated as a basic premise of its decision in *Portland Cement* that the Commerce Clause "requires that interstate commerce shall be free from any direct restrictions or impositions by the States." (358 U. S. at 458) In a nation where powers are divided between the national and state legislatures, it is essential to orderly government that each adhere to its own sphere of legislative action. The Court has always insisted upon the necessity of immunizing the right to engage in interstate commerce from state regulation or taxation, although it has been equally steadfast in permitting the states to achieve their legitimate objectives through regulation utilizing proper constitutional channels. In the present case the state is acting outside its constitutional province, and unnecessarily, since its objective in so doing is one which, as will be shown, this Court has already enabled it to attain in other ways.

C. Application of Qualification Statutes to Interstate Business Serves No Legitimate State Interest But Does Burden Interstate Commerce.

The reason for enactment of the New Jersey statute, which dates from 1894, was to subject foreign corporations to the jurisdiction of state courts, and it was predicated on the state's power "to exclude foreign corporations, or to admit them within its borders upon conditions." *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 412, 60 Atl. 822, 828 (Ch. 1905). This power to exclude has, of course, long been inapplicable to corporations in interstate commerce and the need for rendering foreign corporations amenable to suit by means of such statutes has disappeared because of the ease with which corporations such as appellant are suable under the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945). As a result, to apply the statute today to bar a foreign corporation such as appellant from state courts is to deny justice to the corporation even though it could have been sued in the state courts.*

The court below, not perceiving that this is the true relevance of *International Shoe*, asserted that if "minimum contacts" are sufficient to give state courts jurisdiction in suits against a foreign corporation, they must also warrant application of a state qualification statute to a foreign corporation even though engaged only in interstate commerce.

Such reasoning disregards nearly fifty years of constitutional history. This Court pointed out the important

* This result has been described as follows: "You can't sue me since you didn't qualify so as to insure that I could sue you; but even though you didn't qualify, I can sue you." Note, 33 IND. L. J. 358, 370 (1958). It should be noted that in diversity cases the federal courts would also be closed. *Woods v. Interstate Realty Co.*, 337 U. S. 535 (1949).

constitutional difference between service-of-process cases and qualification cases in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 587-88 (1914). In that case, only four years after the *Pigg* decision, the Court held that a foreign corporation, even though engaged only in interstate commerce and therefore not subject to the Kentucky qualification statute, was nevertheless sufficiently "present" in the state to be served with process and sued in the courts of the state.

The highest courts of other states have long recognized that a foreign corporation in interstate commerce may be subject to suit in state courts even though the state could not require it to qualify to do business. *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917); *State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946).

In so holding in the *Tauza* case, Judge (later Mr. Justice) Cardozo said (220 N. Y. at 267, 115 N. E. at 917):

"In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here (*International Text Book Co. v. Pigg*, 217 U. S. 91)."

In the *Ford Motor* case, the highest court of South Carolina likewise held that a foreign corporation doing interstate business in South Carolina could not be subjected to a penalty for failure to qualify as a foreign corporation although the court held in the same case that the corporation was subject to the process of the state court in the state's suit to collect the penalty.

The basis of the amenability of foreign corporations to state court jurisdiction has evolved from a "presence" test

into the broader "minimum contacts" test of the *International Shoe* case and *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957). Under the rule of these cases foreign corporations are now so easily subjected to state court jurisdiction that the states have no need for qualification statutes to enable their citizens to sue foreign corporations in state courts. Nor is the New Jersey statute necessary to accomplish service of process, since New Jersey court rules provide for service on any servant of a foreign corporation, and when this is not possible, by registered mail addressed to the principal office of the foreign corporation. N. J. Rev. Rules 4:4-4(d).

The State of New Jersey, which intervened in this case to defend the constitutionality of the statute, made no attempt to justify it on the ground for which it was enacted. Rather, it sought to defend the statute as a means of permitting the state to be apprised of the presence of foreign corporations for tax purposes.

This is indeed flimsy support. If deference is to be accorded a state statute it should at least be on the basis of the legislative judgment as to its need and purpose, not on an extraneous administrative use which the ingenuity of counsel finds for it. See *Sprout v. South Bend*, 277 U. S. 163, 169 (1928). The state's newly conceived defense of the statute has no support in the record or in the decisions of the New Jersey courts in the present case or otherwise. If the legislature seeks information regarding foreign corporations to implement its tax and regulatory measures it can require tax returns and other reports.* But the

* It already does so. For example, the New Jersey Tax Bureau requires a return to be filed whenever a corporation is doing business within the state. N. J. Corporation Tax Regs. 16:10-1.130. Similarly, the New Jersey Unemployment Compensation law contains express requirements enforced by penalties, for the filing of reports and returns, and the agency implementing this law has power to require additional reports. N. J. Rev. Stat. 43:21-14.

state cannot condition the right to engage in interstate commerce on compliance with such regulations. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888); *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954). Nor can the state enforce such regulations by denying access to state courts to corporations in interstate commerce. *Furst v. Brewster*, 282 U. S. 493 (1931).

Consideration having been given to the qualification statute from the point of view of the state, which has no need for its application to a foreign corporation in interstate commerce, an examination is appropriate from the viewpoint of the corporation. For the corporation compliance does indeed have burdensome aspects.

By being forced to give a general consent to suit through appointment of an agent for the service of process, the corporation may subject itself to suits not falling within the "minimum contacts" rule, as, for example, suits by non-residents on causes of action arising outside the state. Absent such consent, this Court has on several occasions stricken down as a burden on interstate commerce the assertion of state jurisdiction in such cases. *E.g., Davis v. Farmers Co-op. Equity Co.*, 262 U. S. 312 (1923); see Note, 73 HARV. L. REV. 960, 983-87 (1960). It follows that a statute which forces corporations engaged in interstate commerce to consent in advance to such suits conflicts with the Commerce Clause. *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914). Since under the Court's recent pronouncements a state can obtain jurisdiction on behalf of its citizens in all instances where it is fair to do so, there is no justification for requiring foreign corporations in interstate commerce to consent to additional jurisdiction that interferes with that commerce.

The cumulative effect of compliance with the numerous and varied requirements of qualification statutes can be

additionally burdensome to foreign corporations that do business in a number of states. There are many different requirements, varying from state to state, as to restrictions on corporate name, types and amounts of fees, and classifications of data to be furnished. Most statutes not only require the initial submission of corporate charters and other documents and data but also, like New Jersey, require the filing of periodic reports of one kind or another, thus imposing a recurring burden.

The very fact that a certificate of authority has been obtained from a state is likely to be used as a pretext for taxation by the state. For example, New Jersey asserts that a foreign corporation "holding a general certificate of authority to do business in this state issued by the Secretary of State" automatically acquires a taxable status and is required to file a return and pay a franchise tax.* If it is once established that foreign corporations in interstate commerce can be required to obtain the state's authority to do business, it can be expected that additional requirements will be enacted and further burdens imposed.

In sum, the State of New Jersey in this case has imposed a direct regulation on the right to engage in interstate commerce. It would be ironic for this Court, after having consistently invalidated such statutes in the past, to apply a different rule here where the statute serves no legitimate state need and burdens interstate commerce.

3:10-1.130 of the New Jersey Corporation Tax Bureau follows:

"Every corporation, not expressly exempted, is deemed to have (or to have acquired) a taxable status under the act and is required to file a return and pay a tax thereunder, if it falls within any one of the following categories: ***

"(b) if a foreign corporation,

"(1) holding a general Certificate of Authority to do business in this state issued by the Secretary of State; ***"

II.

Appellees' New Argument that Appellant's Business in New Jersey is Partly Intrastate is Without Foundation.

The constitutional issue discussed in Point I is the only genuine issue in this case. It is the issue on which the court below decided the case and the sole question presented by appellant in its Notice of Appeal and Jurisdictional Statement. However, in their motions in this Court to dismiss this appeal, appellees attempted to avoid that issue by advancing the new argument that the business appellant does in New Jersey is partly intrastate. This contention is not only an afterthought, but even if true would not justify affirmance of the decision below.

Since the present suit is vitally related to appellant's interstate business, it is one that appellant has the right to bring even if it were also doing some intrastate business. *Furst v. Brewster*, 282 U. S. 493 (1931); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); see *Crutcher v. Kentucky*, 141 U. S. 47, 59 (1891). Appellant's fair trade enforcement at the retail level is an integral part of its interstate operations, as recognized by a decision of the Supreme Court of New Jersey itself in a case involving a similar fair trade program. *Johnson & Johnson v. Weissbard*, 11 N. J. 552, 95 A. 2d 403 (1953).*

* The courts of all other states which have passed on the point are in accord: *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959); *Weco Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. Minn. 1960); *Seagram Distillers Co. v. Corenswet*, 198 Tenn. 644, 281 S. W. 2d 657 (1955); *Fromm & Sichel, Inc. v. Zimmerman*, 1956 CCH Trade Cases, par. 68,362 (D. Ill. 1956); *Ronson Corp. v. Macher Jewelry & Watch Corp.*, 1955 CCH Trade Cases, par. 68,193 (N. Y. Sup. Ct. N. Y. Co. 1955); *Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958); *Bulova Watch Co. v. Anderson*, 270 Wisc. 2d, 70 N. W. 2d 243 (1955); *Sunbeam Corp. v. Grayson-Robinson Stores, Inc.*, 1953 CCH Trade Cases, par. 67,499 (Super. Ct. Cal. 1953). This Court has itself held that fair trade pricing by an interstate seller is a part of the interstate marketing arrangement. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951).

In addition to the irrelevance of the argument, there is no basis in the record for contending that appellant does any intrastate business.

A. The Contention that Appellant is Engaged in Intrastate Commerce is Not Properly Before the Court.

The whole thrust of the appellees' argument below was that the New Jersey statute, which by its terms requires qualification before transacting "any business" in the state, encompasses business solely in interstate commerce, and that there is no longer any federal constitutional barrier to the application of the statute to interstate business. In adopting the appellees' contention, the court below similarly did not question that appellant is engaged entirely in interstate commerce in New Jersey. The court not only referred to appellant's sales as being only in interstate commerce but devoted an entire section of its opinion to the constitutional question premised on the fact that appellant was "engaged entirely in interstate commerce" (R. 38-41).

The finding that appellant was "doing business" in New Jersey referred to the regularity and continuity of appellant's activity in the state. There is no basis for suggesting that this finding implies the doing of intrastate business. The court clearly did not so intend, as it would not even have reached the constitutional issue if it had found that appellant was doing intrastate business. In *International Textbook Co. v. Pigg*, 217 U. S. 91, 103-06 (1910), this Court agreed with the state court's finding that a corporation was "doing business" in the state, but held that the business the corporation was doing was entirely interstate. Similarly in *Buck Stove Co. v. Vickers*, 226 U. S. 205, 214 (1912), the Court found that the cor-

porations involved "were doing business in Kansas—a purely interstate business".

There being nothing in the opinion below to support the contention that appellant is engaged in intrastate commerce in New Jersey, it is clear that the new point sought to be raised by appellees in their motions to dismiss was an attack on the finding of the court below. That the appellees' contention is a new one in this Court is underscored by the fact that the only case cited to support it in the motions to dismiss was one not cited below by either appellee or the court—*Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918).

Having persuaded the courts below that the New Jersey statute applies to appellant's exclusively interstate activities, appellees apparently hoped to convince this Court that the decision below was right on the entirely different ground that appellant is engaged in intrastate commerce. In view of appellees' contentions below, accepted by the New Jersey courts, it is not now open to them to question the underlying factual basis of the court's decision of the constitutional question. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 434-35 (1907). This would inject a new question on appeal, which this Court has consistently refused to allow. *E. g., Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 38-39 (1913); *Blair v. Oesterlein Mach. Co.*, 275 U. S. 220, 225 (1927); *Knetsch v. United States*, 29 U. S. L. WEEK 4018, 4020 (U. S. Nov. 14, 1960).

B. Appellant's Activities in New Jersey are Part of its Interstate Business.

Even if the question were open, there is no basis for holding that appellant is engaged in intrastate commerce in New Jersey. Appellant sells its products in New Jersey entirely in interstate commerce to wholesale distributors

under contracts made in Indiana. It has no warehouse or stock of goods in New Jersey and makes no local sales. All of its New Jersey revenues are from interstate sales, and all of its activities in the state contribute to these interstate sales.

In contending in their motions to dismiss that appellant is engaged in-intrastate commerce in New Jersey, appellees devised a highly technical argument based solely on the *Cheney* case, an excise tax case which did not even involve the legal question presented here—qualification and access to courts.* That case involved several companies, and the decision relied on by the appellees related to North-western Consolidated Milling Company, which was held to be doing a local business subject to taxation. (This part of the case will be referred to as the *Northwestern Consolidated* decision.)**

There are salient factual differences between the *Northwestern Consolidated* decision and the present case. There, as appears more fully in the opinion of the Supreme Judicial Court of Massachusetts, which this Court affirmed, the corporation had actually qualified to do a local business in accordance with the Massachusetts qualification statute. (218 Mass. 558, 562, 106 N. E. 310, 311 (1914)*** It main-

* It has long been recognized that the courts have had less difficulty in finding a business local for purposes of state taxing power than for purposes of qualification statutes. Isaacs, *An Analysis of Doing Business*, 25 Col. L. Rev. 1018, 1025 (1925). This stems from the policy that "interstate business must pay its way." *Postal Tel-Cable Co. v. Richmond*, 249 U. S. 252, 259 (1919); *cf. McGoldrick v. Berwind White Co.*, 309 U. S. 33 (1940).

** The *Cheney* case is best known for the decision regarding the Cheney Brothers Company. That company had an office in Massachusetts where it maintained a stock of samples and a sales force taking orders for interstate sales. This Court, in invalidating a Massachusetts tax on the Company, held that these activities were in interstate commerce. That ruling supports the appellant's position here.

*** The case in the state court is reported under the name *Marconi Wireless Tel. Co. v. Massachusetts*.

tained an office in Boston which had "charge of the business of the company in New England and a part of New York." This office received and accepted orders from wholesalers and also kept on hand a stock of goods from which local sales were made. (218 Mass. at 575, 106 N. E. at 317.) In addition, the Massachusetts court found:

"The *major part* of the petitioner's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in *soliciting* orders from domestic retailers. This is in substance the *business of providing agents* for the wholesalers." 218 Mass. at 575, 106 N. E. at 317 (emphasis supplied).

In contrast to the activities of Northwestern Consolidated, appellant accepts no orders in New Jersey and keeps no stock of goods there. It maintains no general business office in the state. Rather, an employee rents an office from which he supervises the promotional activities of appellant's detail men. These detail men do not solicit orders nor do they act as agents for any domestic concern. Their sole function is to promote the products appellant sells in interstate commerce. Such promotion, even when accompanied by active solicitation within the state, has been held a part of interstate commerce so repeatedly that elaboration of the point is unnecessary. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (1887); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 437 (1938). See also the many cases on the point cited in *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 392 (1952).*

Apparently the straw at which the appellees grasp in seeking to assimilate this case to the *Northwestern Consolidated* decision is the fact that the appellant's detail men, as

* Advertising by a manufacturer of products sold by it in interstate commerce is a part of that commerce even though designed to stimulate sales at the retail level. *Ford Motor Co. v. FTC*, 120 F. 2d 175, 179 (6th Cir. 1941).

a courtesy to a retailer, occasionally receive and transmit to a wholesaler an unsolicited order of the retailer. This incidental circumstance is too trivial and insubstantial to localize the essentially interstate character of appellant's business in New Jersey and was plainly regarded as immaterial by the court below. (R. 34-5) *Cf. Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 461 (1959). This is a far cry from the systematic furnishing of salesmen to act as agents for local wholesalers in the active solicitation of retail orders, which was found to constitute the major part of the business of Northwestern Consolidated.

It is clear from the *Portland Cement* case that if the *Northwestern Consolidated* decision still represents the law at all, it is strictly limited to its own facts. In *Portland Cement* one of the corporations involved had salesmen in the state who, in addition to soliciting direct interstate sales, solicited orders which were turned over to local dealers who in turn purchased from the corporation. The activities of the corporation in the state were nevertheless held to be entirely in interstate commerce. (358 U. S. at 454-55) Moreover, Public Law 86-272, 73 Stat. 555 (1959), enacted by Congress after the *Portland Cement* decision, exempts from state taxation income derived from the solicitation of such orders, as well as from the solicitation of direct interstate orders. The classification of such activity as interstate commerce, because of its importance to interstate sales, was a principal objective of the Act. S. REP. No. 658, 86th Cong., 1st Sess. (1959).

The court below addressed itself to the real issue in this case. It recognized that only interstate commerce was involved but thought that cases such as *Portland Cement* and *International Shoe* changed the rule of the *Pigg* line of cases. In this it was clearly wrong, as has been shown in Point I. Appellees' attempt as an afterthought to redeem that error by arguing that that issue was not even before the court is as lacking in substance as it is in timeliness.

Conclusion.

The decision below disregards a constitutional rule that is as sound today as when it was formulated. The doctrine of the *Crutcher* and *Pigg* cases has encouraged the free flow of interstate commerce without hampering the legitimate interests of the states. The principle that interstate commerce is not a privilege granted by the state has been accepted by all the states, including New Jersey until this case, and has been relied upon by corporations all over the country in formulating their business policies and methods. To hold now that interstate corporations large and small can be required to comply with 50 different sets of state corporation laws, with their varying requirements as to filing of reports, payment of fees and taxes and subjection to jurisdiction, would place an intolerable and unnecessary burden on interstate commerce.

The judgment below, being clearly erroneous, should be reversed.

Respectfully submitted,

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APPENDIX.

Sections of New Jersey Revised Statutes Involved.

14:15-3.

"Copy of charter and statement to be filed; certificate of authority to do business. Every foreign corporation, except banking, insurance, ferry and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal; and a statement attested in like manner setting forth:

"a. The amount of its authorized capital stock and the amount actually issued;

"b. The character of the business which it is to transact in this state; and

"c. The principal office of the corporation in this state and the name and place of abode of an agent upon whom process against such corporation may be served, which agent shall be a domestic corporation or a natural person of full age actually resident in this state, and the agency shall continue until the substitution, by writing, of another agent.

"Thereupon the secretary of state shall issue to the corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and he shall keep a record of all such certificates issued."

14:15-4.

"Certificate of authority to do business prerequisite to suits on contracts. Until such corpora-

tion so transacting business in this state shall have obtained such certificate of the secretary of state, it shall not maintain any action in this state upon any contract made by it in this state."

14:15-5.

"Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations. When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

14:15-6.

"Penalty for failure to obtain certificate of authority to do business. Every foreign corporation transacting any business, directly or indirectly, in this state, without having first obtained authority therefor, as provided in section 14:15-3 of this title, shall for each offense forfeit to the state the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the attorney general in the name of the state."

14:15-7.

"Surrender of privileges and franchises; certificate issued by Secretary of State. Any foreign corporation which shall have received a certificate authorizing it to transact business in this State may surrender the rights, privileges and franchises conferred upon it by the certificate and withdraw from this State by filing with the Secretary of State (1) a copy of the resolution of its board of directors authorizing such surrender and withdrawal, certified to be a true copy under the hand of the secretary of the corporation and the seal of the corporation, (2) a copy of a certificate of dissolution, issued by the appropriate official of the state of domicile of the foreign corporation, certified to be a true copy under the hand of the official and his official seal, or (3) a copy of an order or a decree of dissolution, made by any court of competent jurisdiction of the state of domicile of the foreign corporation, certified to be a true copy under the hand of the clerk of the court and his official seal. Upon the filing of any such certificate the Secretary of State shall issue a certificate under his hand and official seal evidencing the surrender of the rights, privileges, and franchises conferred upon the foreign corporation and its withdrawal from the State."

14:16-1.

"Fees of Secretary of State. On filing any certificate or other papers relative to corporations in the office of the Secretary of State, there shall be paid to the Secretary of State for the use of the State, fees and taxes as follows: * * *

Copy of charter and statement of foreign corporation and issuing certificate of authority to transact business, ten dollars."

14:6-2.

"Annual report to Secretary of State. Every domestic and every foreign corporation doing business in this State shall file in the office of the Secretary of State, within thirty days after the first election of directors and officers, and annually thereafter, within thirty days after the time appointed for holding the annual election of directors, a report authenticated by the signatures of the president and one other officer, or by any two directors, stating:

- a. The name of the corporation;
- b. The name of the municipality, street and number, if number there be, of its registered office in this State, and the name of the agent upon whom process against the corporation may be served;
- c. The character of its business;
- d. The amount of its authorized capital stock, if any, and the amount actually issued and outstanding;
- e. The names and addresses of the directors and officers of the company and when the term of office of each expires;
- f. The date appointed for the next annual meeting of the stockholders for the election of directors; •••

If the report is not so made and filed the corporation shall forfeit to the State two hundred dollars (\$200.00), to be recovered with costs in a civil action, to be prosecuted by the Attorney-General, who shall prosecute such actions whenever it shall appear that this section has been violated. •••"

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JAMES B. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR APPELLEE SAV-ON-DRUGS, INC.

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February 8, 1961.

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IN THE
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No. 203

ELI LILLY AND COMPANY,

Appellant.

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SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR APPELLEE SAV-ON-DRUGS, INC.

Question Presented

Does New Jersey's foreign corporation registration law (N.J.R.S. 4:15-3 to 5) contravene the Commerce Clause of the United States Constitution when applied to appellant, which maintains an office and has twenty employees in the State engaged in the promotion of intrastate sales?

Statement

Appellant is an Indiana manufacturer of pharmaceutical products.

Appellee operates two retail drug stores in New Jersey. Appellee buys nothing direct from appellant and has not signed appellant's fair trade contract but is nevertheless

bound by it under the non-signer provision of the New Jersey fair trade law (N.J.R.S. 56:4-6). Appellee purchases all its Lilly products from New Jersey wholesalers.

Appellant instituted this action to enjoin appellee from selling Lilly products below established fair trade prices. Without conceding that it violated appellant's fair trade prices, appellee moved to dismiss the complaint for appellant's failure to comply with New Jersey's foreign corporation registration law (N.J.R.S. 14:15-3 to 5). The motion was granted and the resulting judgment was affirmed by the highest court of the State on the basis of the trial court's opinion (R. 47).

Appellant's business in New Jersey is done in the following manner:

Appellant makes direct sales to New Jersey wholesalers "in interstate commerce pursuant to distributor contracts made in the State of Indiana" (R. 27).

Appellant employs a district manager, secretary and eighteen so-called "detail men" in New Jersey. Their headquarters are in Newark. They are salaried personnel (R. 28-29).

The place where the district manager and secretary have their office and which serves as headquarters for the eighteen detail men who cover the State is listed in the building directory and in the Newark telephone book under the name of Eli Lilly & Company (R. 35). The lease is in the name of the district manager, but it is appellant's name that is on the door, and appellant reimburses the district manager for all expenses incident to the maintenance and operation of the office (R. 28).

The function of the detail men is to promote *intrastate* sales of Lilly products. "They do not accept orders under any circumstances for the purchase of Eli Lilly and

Company products", (R. 29). They transmit orders received from New Jersey retailers to local wholesalers (R. 29, 35). Apparently, they *never* transmit orders directly to the home office in Indiana (R. 28-29).

These local sales are promoted by appellant's detail men by visits to retail pharmacists, physicians and hospitals, in the course of which (1) they describe the various Lilly products and urge that these products be prescribed by the physicians, (2) they check up on "the stocks and inventory of the retailer to ascertain whether the retailer may be carrying a sufficient supply to meet potential demand", (3) they recommend "the enlargement of his available supply", (4) they transmit orders to local wholesalers, (5) they provide retailers with free advertising and promotional material (R. 29, 25-26), (6) they urge pharmacists, physicians and hospitals to "order Lilly products from local wholesale distributors" (R. 27). Appellant also polices its fair trade prices by personal visits (R. 3, 5) in order to protect appellant's property rights in the goodwill which attaches to its trademarks (R. 1-2). The detail men who service appellee's two stores, one in Carteret and the other in Plainfield, have not only done all of these things but have given appellee their home telephone numbers so that appellee can reach them in case of need (R. 25-26). Most, if not all, of the detail men are residents of New Jersey (R. 35).

N.J.R.S. 14:15-3 to 5 provide that a foreign corporation before transacting business in New Jersey must file with the Secretary of State a copy of its charter and a statement describing its capital stock, the character of its business, its principal office in the State and the name and address of a resident agent to accept service of process. Upon the corporation's compliance with the

above, a certificate authorizing it to do business in New Jersey must be issued as a matter of course. A foreign corporation transacting business in New Jersey may not maintain an action in the State until it has obtained such certificate.

Summary of Argument

I

By employing twenty people in New Jersey continuously to generate local purchases of its products from local wholesalers, and by providing a local office for these employees, albeit under cover of a lease made in the district manager's name, appellant is engaged in a form of local activity which is so significantly separate and distinct from its interstate sales to New Jersey wholesalers as to warrant the classification of intrastate commerce. Regardless of appellant's motive, which is indirectly to stimulate interstate sales by directly stimulating local sales, appellant is engaging in the intrastate business of providing a sales force for local wholesalers of Lilly products. *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 155 (1918).

For the privilege of carrying on intrastate commerce, New Jersey may require appellant to register with its Secretary of State without contravening the Commerce Clause of the United States Constitution.

II

Even if all of appellant's activities within the State were thought to be exclusively in furtherance of interstate commerce, the burden of New Jersey's foreign corporation registration law is so insignificant when viewed

in the light of the State's legitimate interest in requiring foreign corporations to identify themselves and designate agents for service of process, that it cannot be said to contravene the Commerce Clause. *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944).

ARGUMENT

I

Eli Lilly is engaged in intrastate commerce in New Jersey. Therefore, application to it of New Jersey's registration statute does not violate the Commerce Clause of the United States Constitution.

It is clear from the facts in the record that appellant is engaged both in *interstate* and *intrastate* commerce in New Jersey. Its *interstate* commerce consists of the sale of its products to wholesalers in New Jersey "pursuant to distributor contracts made in the State of Indiana" (R. 27). Its *intrastate* commerce is conducted from an office in Newark by a district manager, assisted by a secretary and eighteen detail men, all of whom are salaried employees. Appellant also pays for the office. The function of these employees is to promote local sales of Lilly products. In the words of one of Lilly's officers: "The primary purpose of said employees is to acquaint retail pharmacists, physicians and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians and hospitals will order Lilly products from local wholesale distributors" (R. 27, emphasis supplied).

It was upon these undisputed facts, which it reviewed in great detail (R. 35), that the trial court reached its

decision that appellant was doing business in New Jersey. It was likewise with these facts in mind that the court concluded that the Commerce Clause was not violated by the State's requirement that appellant register as a foreign corporation.

Appellant infers that the trial court considered appellant to be "engaged entirely in interstate commerce" (brief, p. 27). What in fact the court said was: "Plaintiff contends that it is exempted from any requirements to comply with foreign corporation provisions of our Corporation Act because it is engaged entirely in interstate commerce" (R. 38, emphasis supplied). The court was merely repeating appellant's contention, not adopting it. The court thereupon indicated that even if Lilly were engaged essentially in interstate commerce, as appellant contends, New Jersey's requirement that Lilly comply with the State's registration provision would not impose an undue burden on that commerce. (R. 38-41).

A more recent decision by the Superior Court of New Jersey (*United States Time Corp. v. The Grand Union Co.*, 64 N. J. Super. 39 (11/16/60)), exempting a foreign corporation from registration under the Act in question, makes clear that the decision in the case at bar was grounded on Lilly's localized activities in New Jersey. In that case, as distinguished from the present case, the foreign corporation's activities in the State were restricted to soliciting and making interstate sales. The court, after describing Lilly's localized activities in New Jersey, noted "that the evidence before the Court in *Lilly* is not present before the court in the case *sub judice*" (*id.* at 46), and hence permitted plaintiff to proceed without registration.

In any event, regardless of the precise basis of the trial court's opinion, this Court is free to affirm a judgment upon any ground which has support in the record. *LeTully v. Scofield*, 308 U. S. 415, 421 (1940) ("A respondent or an appellee may urge any matter appearing in the record in support of a judgment"); *Helevering v. Gowran*, 302 U. S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason"); *Jaffke v. Dunham*, 352 U. S. 280, 281 (1957); *Langnes v. Green*, 282 U. S. 531, 535-537 (1931); *United States v. American Railway Express Co.*, 265 F. S. 425, 435-436 (1924).

In spite of this settled law to the contrary, appellant argues that appellee may not urge affirmance of the decision below on the ground that Lilly engaged in infrastate commerce in New Jersey, claiming that this is a new contention not relied upon by the court below (brief, pp. 27-28). Not one of the four cases cited by appellant to support this contention is in point. In *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 434 (1907), this Court refused to permit the appellee to urge affirmance upon grounds which ran counter to a material concession that it made below. *Virtue v. Creamery Package Mfg. Co.*, 227 F. S. 8 (1913) and *Blair v. Oesterlein Machine Co.*, 275 U. S. 220 (1927), dealt with the attempted reversal of lower court decisions on grounds not previously urged. As noted, the rule is different when, as in the instant case, appellee urges affirmance. In the fourth case cited by appellant, *Knetsch v. United States*, 364 U. S. 361, 370 (11/14/60), all that this Court held was that it would not entertain for the first time in a brief *amicus*

curiae a contention which had never been raised by the petitioners at any stage of the proceedings.

It is clear that appellant in the case at bar was engaged in intrastate commerce.

It is equally clear that the lower court perceived and relied upon this; but even if such were not the case, this Court could rely upon the demonstrated intrastate commerce to sustain the decision of the lower court.

It follows that application of the foreign registration statute to appellant does not contravene the Commerce Clause. Appellant in its Jurisdictional Statement herein, at p. 11, conceded as much when it said:

"The rule of the *Paul* case [*Paul v. Virginia*, 8 Wall, 168 (1868)] still applies to foreign corporations as regards intrastate commerce in which they engage within a state, even if such intrastate business is done by a corporation which is also engaged in interstate commerce. See, e.g., *Railway Express Co. v. Virginia*, 282 U. S. 440 (1931); *General Ry. Signal Co. v. Virginia*, 246 U. S. 500 (1918). Such corporations are, of course, required to comply with state qualification statutes."

Additional cases supporting the same proposition are *Diamond-Glue Co. v. United States Glue Co.*, 187 U. S. 611 (1903); *Interstate Amusement Co. v. Albert*, 239 U. S. 560 (1916); and that part of *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 154-155 (1918), which deals with Lanston Monotype Co., Locomobile Company of America and Northwestern Consolidated Milling Co.

In its present brief on appeal, appellant has changed its position somewhat, in contending that:

"Since the present suit is vitally related to appellant's interstate business, it is one that appellant

"has the right to bring even if it were also doing some intrastate business" (brief; p. 26).

The cases appellant cites in support of this proposition (*Furst v. Brewster*, 282 U. S. 493 (1931); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); *Crutcher v. Kentucky*, 141 U. S. 47 (1891)) are not in point. The first two cited cases dealt with the application of state registration requirements to companies engaged exclusively in interstate commerce in the state of the forum; in the third (*Crutcher*), this Court struck down a statute which excluded all foreign express companies from doing business in Kentucky unless they had a capital of at least \$150,000.

Moreover, in the two cited cases which denied the foreign corporation's right to bring an action without registering (*Furst* and *Sioux Remedy*), the suits, unlike appellant's, were brought to enforce *interstate contracts*. By contrast, Lilly's suit herein is not upon an interstate contract. Lilly and appellee have never made any such contract. Lilly has never made a single direct sale to appellee. This action relates to appellee's local sales to New Jersey consumers, not to Lilly's interstate sales to New Jersey wholesalers.

The purpose of this action is to protect property rights located in New Jersey, namely, the goodwill inherent in appellant's trademarks (R. 1-2). This Court specifically recognized this property right as the constitutional basis for retail price maintenance. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 194-5 (1936).

The New Jersey Court of Errors and Appeals in *Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585, 586,

191 Atl. 873 (1937), followed *Old Dearborn* in every regard and commented in addition as follows:

"Nor do we perceive how the requirements of our statute affect interstate commerce. It is a mere direction to a resident merchant that he must not resell trade marked or branded articles at less than the price fixed by the producer or owner of such marked commodities."

The immediate object and effect of the present litigation could not be more local: it seeks to fix the price of a product sold by a New Jersey retailer (who bought it from a New Jersey wholesaler) to a New Jersey consumer.

That Eli Lilly's activities in New Jersey must be regarded as intrastate in character is also made clear by that part of the opinion in *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 155 (1918), which concerns Northwestern Consolidated Milling Co. In that case the question was whether the imposition on Northwestern of an excise tax described by the Massachusetts court as "a license fee exacted from foreign corporations for the privilege of doing in this State business other than interstate commerce"** violated the Commerce Clause. As appears more fully from the opinion of the Massachusetts court, which this Court affirmed, reported under the name of *Marconi Wireless Tel. Co. v. Commonwealth*, 218 Mass. 558 at 575, 106 N. E. 310 at 317 (1914), Northwestern was a Minnesota corporation which maintained an office in Boston. This office served as headquarters for sixteen salesmen, seven of whom were devoted to Massachusetts trade. "These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the

* 106 N. E. at p. 311.

retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him." 246 U. S. at page 155.

On the basis of these facts, this Court concluded:

"Of course, this is a domestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the state, regardless of the motive with which it is conducted." *Ibid.*

Appellant, on page 30 of its brief, attempts to distinguish the above decision on the ground that in its opinion, the Massachusetts court stated:

"The *major part* of the petitioner's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in soliciting business from domestic retailers. This is in substance the *business of providing agents* for the wholesalers." (Appellant's emphasis.)

It is submitted that the above statement in fact supports appellee's contention that the Northwestern case is on-all fours with the case at bar with reference to the nature of the foreign corporation's business activities in the state of the forum. Lilly's detail men, just like Northwestern's salesmen, never solicit sales in interstate commerce. They *do* transmit some orders from New Jersey retailers to New Jersey wholesalers. Moreover, all of their activities in the state are directed toward promoting *intrastate* sales by New Jersey wholesalers. Repeating the words of appellant's Assistant Secretary, "The primary purpose of said employees is to acquaint retail pharmacists, physicians and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians and hospitals

will order Lilly products from local wholesaler distributors" (emphasis supplied, R. 27).

The argument made by appellant that its detail men's "sole function is to promote the products appellant sells in interstate commerce" (brief, p. 30) was also advanced by Northwestern, and rejected by the state court in the following language:

"The motive which influences the plaintiff in undertaking this business is inconsequential in determining whether it constitutes interstate commerce. The fact that a natural result may be to increase the sales of the plaintiff to the wholesalers is an immaterial circumstance. It is too remote from the actual business of the plaintiff's salesmen to constitute that interstate commerce" (106 N.E. at 318).

The above language, of course, applies with equal force to the case at bar. The fact that the wholesalers in both cases received the foreign corporation's products in interstate commerce in no way negatived the fact that its salesmen's (detail men's) activities were intrastate in character.

Finally, appellant suggests that its activities in New Jersey are like those involved in the typical drummer cases, such as *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887) (brief, p. 30). This demonstrates that appellant misses the whole point of Northwestern (and of *Robbins*), namely, that while the solicitation and promotion of direct sales in interstate commerce is protected by the Commerce Clause, solicitation and promotion of *intrastate* sales is not, even though such local sales may *indirectly* result in additional interstate commerce.

II

Even if Lilly's activities in New Jersey are considered to be in furtherance of interstate commerce, the requirement that Lilly comply with that State's registration provision does not impose an unconstitutional burden on interstate commerce.

Appellant's insistence that: "The right to engage in interstate commerce may not be subjected to state-imposed conditions" (subheading of brief, p. 8), simply does not represent the law as it has been developed by this Court. It is not the imposition of any condition that is prohibited by the Commerce Clause, but only the imposition of an unduly burdensome one.

In *Cooley v. Board of Wardens*, 12 How. [53 U. S.] 299 (1851), this Court delineated the following principles: (a) where the area of interstate commerce requires a uniform set of rules, the States cannot act, even when Congress is silent; (b) where the problem is such that diversity and local action is not undesirable, the States may act in the absence of federal legislation, even though some burden is imposed on interstate commerce.

State action in the interstate commerce field is permissible *provided*: (1) the regulations do not discriminate against interstate commerce in favor of intrastate commerce, and (2) the burden imposed is not too great in light of competing state and federal interests.

Applying these principles to the present case, it appears that (1) Congress is silent; (2) the subject does not require a uniform set of rules throughout the nation; and (3) there is no suggestion that discrimination is an issue. Thus, the real questions emerge: what is the burden upon

interstate commerce and is this burden justified in the light of the interests of the State?

Such a balancing of interests is the key to the diverse cases dealing with corporate registration requirements and with the licensing of persons in interstate commerce. It underlies and explains the cases cited by appellant which have struck down certain registration and license requirements; as well as those which have upheld others.

In applying this principle, it becomes necessary in each instance where a State's registration or licensing requirement is challenged "to ascertain precisely what demand the State has here made, in relation to what transaction or activity it is making such demand", *Union Brokerage Co. v. Jensen*, 322 U. S. 202, at 203 (1944).

The demand that the State of New Jersey has made in N.J.R.S. 14:15-3 is simply that every foreign corporation doing business within its borders make its presence known to the Secretary of State by filing in his office a copy of its charter plus a statement describing its capital stock, the character of its business, its principal office in the State, and by designating an agent to accept service of process. Upon the corporation's compliance with the above, a certificate authorizing it to do business must be issued as a matter of course. No discretion is vested in the Secretary of State to refuse registration. Once a foreign corporation registers, it may enforce a contract made before registration. In fact, the corporation may even register during the pendency of the suit and thereupon continue the action. *Protective Finance Corp. v. Glass*, 100 N.J. L. 85, 125 Atl. 879 (Sup. Ct., 1924), *Day v. Stokes*, 97 N. J. Eq. 378, 127 Atl. 331 (E. & A., 1925). If Lilly files tomorrow, this appeal will be moot.

A mere listing of the requirements of the statute which must be complied with prior to institution of an action

by a foreign corporation doing business in New Jersey indicates that we are not here dealing with an unreasonable burden on interstate commerce.

The most that can be said is that such a corporation is (1) subjected to a minimal amount of paper work, and (2) obliged to designate an agent for service of process in the State. It is submitted that the designation of an agent for service of process can no longer be considered a significant burden on a corporation doing business in another State, in view of the fact that such corporation, even if it has only minimal contacts with such State, is in any event subject to suit therein regardless of whether or not it has designated an agent for service of process. *International Shoe Co. v. State of Washington*, 326 U. S. 310 (1945); *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957).

Balanced against this insignificant "burden" imposed on foreign corporations by the New Jersey registration requirement is the State's legitimate interest in insuring (1) that its residents have an easy, certain and expeditious means of serving process on foreign corporations doing business in the State, and (2) that the corporation's presence in the State is brought to the State's attention so that compliance with its unemployment insurance, disability insurance, and workmen's compensation laws (appellant has twenty local employees), as well as its tax and other laws may be assured.*

As noted by Professor Henderson, in his work, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918), at page 74:

"A state is fundamentally interested in the activities of corporations within its boundaries. It is

* In this connection it may be observed that a corporation whose sales within the State are made exclusively in interstate commerce may now be subjected to a fairly apportioned income tax. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959).

interested in the wages which they pay, in the conditions of labor which they maintain, in the price and quality and quantity of their output, in their solvency and honest management, in their accountability before Courts of Justice. But these are interests which attach to domestic corporations as well as to foreign ones. All legislation must be tested, then, by the fundamental criterion whether it is reasonably adapted to securing these interests; and whether it proceeds in its incidence on a classification which bears a reasonable relevance to the practical problem of securing them."

The same approach has been manifested by this Court. In *California v. Thompson*, 313 U. S. 109 (1941), this Court considered a California statute which required transportation agents to be licensed in that State. The licensee was required to pay a nominal fee and to post a bond conditioned upon the faithful performance of the contracts negotiated by him. The appellee contended that the statute's application to one who negotiates exclusively for the transportation of interstate passengers violated the Commerce Clause. This Court, sustaining the statute, stated that:

"Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free

flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints" (p. 113).

Similarly, in *Robertson v. California*, 328 U. S. 440 (1946), it was held that a licensing statute applied to persons selling insurance in interstate commerce (which required a \$50 filing fee and the posting of a fidelity bond) did not contravene the Commerce Clause. Upon noting that the statute was a reasonable police regulation, enacted for the benefit of its citizens, the Court concluded that "There can be no substantial question concerning its validity on commerce clause grounds. That is true whether appellant's acts are taken, in their setting, as being 'in' commerce or only 'affecting' it" (pp. 447-8, emphasis supplied).

In *Duckworth v. Arkansas*, 314 U. S. 390 (1941), the Court upheld a statute requiring a permit for the transportation of intoxicating liquor through the State. The permit was obtainable upon application and payment of a nominal fee. The object of the license regulation was merely to identify those who engaged in such transportation, their rates and points of destination. Although, in view of the fact that the transportation of liquor was involved, the case might have been decided under the provisions of the Twenty-First Amendment (as was urged by Justice Jackson in a concurring opinion), it is significant that the Court's opinion considered only the effect of the Commerce Clause. In upholding the license requirement, the Court said:

"It does not forbid the traffic in liquor, nor does it impede it more than is reasonably necessary to

inform the local authorities who is to effect the transportation through the state, and to afford opportunity for them to police it" (p. 393).

See also *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U. S. 329 (1951), wherein extensive regulations governing the distribution of natural gas in interstate commerce were upheld, in view of the State's vital interest in such sales.

The principle underlying these decisions embraces protection of state interests not only in particular situations where it is thought that there may be abuses, but applies equally to the protection of the general welfare of the State. This is made clear by *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944), which dealt with a Minnesota foreign corporation registration law, practically identical to the one involved in the case at bar. In *Union* an unregistered foreign corporation was engaged in the customs brokerage business, which, in the language of the Court, "aids in the collection of customs duties and facilitates the free flow of commerce between the foreign country and the United States" (p. 209). In the course of that business, *Union* had "localized its business, and to function effectively, it [had to] have a wide variety of dealings with people in the community" (p. 210).

Because of *Union's* failure to register in Minnesota, it was barred from maintaining an action against defendants for breach of their fiduciary obligation to the corporation. Addressing itself to *Union's* claim that the registration requirement violated the Commerce Clause, this Court noted at the outset that:

"It becomes necessary therefore to ascertain precisely what demand the State has here made,

in relation to what transactions or activity it is making such demand, in what way federal authority has regulated such transactions or activity, and, finally, whether the Commerce Clause by its own force, in case federal law has not actually taken control, excludes the State from the exercise of the power it has here asserted" (p. 203).

The Court, after concluding that the State could properly legislate despite the presence of federal customs law, stated the crucial issue to be the effect of the registration statute on the Commerce Clause:

"In a situation like the present, where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either" (pp. 207-208).

The Court noted that Minnesota "is legitimately concerned with the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders" (p. 208), and went on to state, in language which is equally applicable to the situation at bar:

"The incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process."

"The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State. Apart from any question of interference with foreign commerce such a require-

ment is plainly within the regulatory power of a State. . . . The burden, such as it is, falls on foreign businesses that commingle with Minnesota people, and the burden, a fee of fifty dollars, is sufficiently small fairly to represent the cost of governmental supervision of foreign business enterprises coming into Minnesota. In short, it is a supervisory and not a fiscal measure. As such it imposes costs upon the state which those who are supervised must, as is often the case, themselves pay. See *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 267.

"The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause. By its own force that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to its citizens in the course of their contacts with business conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. And so we conclude that in denying Union the right to go to her courts because Union did not obtain a certificate to carry on its business as required by the Foreign Corporation Act, Minnesota offended neither federal legislation nor the Commerce Clause" (pp. 210, 211, 212).

In the light of *Union Brokerage v. Jensen*, the cases relied upon by appellant in support of its contention that no conditions whatsoever may be imposed by a State upon corporations doing an interstate business are not persuasive.* They stand only for the proposition that a specific state requirement when viewed in relation to a foreign corporation's activities in the regulating State imposed an unreasonable burden on interstate commerce.

Appellant's lead case, *Crutcher v. Kentucky*, 141 U. S. 47 (1891), invalidated a state law, which prohibited any foreign express company from doing business (including exclusively interstate business) in Kentucky unless it had a capital of at least \$150,000. As the language from the opinion quoted by appellant on page 9 of its brief makes clear, the Court held that the licensing requirements "cannot have the effect of depriving [foreign corporations] of such right" to engage in interstate commerce.

While it is obvious that many express companies (all those which had a capital of less than \$150,000) were unequivocally deprived of the right to do an interstate commerce business in Kentucky, no foreign corporation (and certainly not Eli Lilly) is deprived of the right to do an interstate business in New Jersey by that State's simple registration requirements.

International Textbook v. Pigg, 217 U. S. 91 (1910), declared unconstitutional a Kansas registration statute which was far more burdensome than the one here under review. It required, among other things, the listing of all shareholders of the foreign corporation and provided that even after compliance with its requirements, authority

*Fletcher, in his treatise on Corporations, cites the case for the proposition that "there are indications that interstate commerce may no longer serve as a barrier to qualification." 17 FLETCHER, CORPORATIONS, §422, p. 387 (Rev. Vol. 1960).

to do business in Kansas could be withheld in the discretion of State officials if they determined that the corporation's capital had been impaired. The requirement that a certificate be obtained as a condition to the corporation's access to the State's courts was invalidated only because the Court considered it unseverable from the onerous burden imposed by the filing requirements. Moreover, the subject of the lawsuit, unlike that involved in the case at bar, was to enforce an interstate contract, and hence could not have been more directly related to the corporation's interstate commerce activities.

Buck Stove Co. v. Vickers, 226 U. S. 205 (1912), adds nothing. It involved the same Kansas statute and merely followed *International Textbook*. Like that case, it involved a foreign corporation doing "a purely interstate business" (p. 214).

Sioux Remedy Co. v. Cope, 235 U. S. 197 (1914), involved an Iowa registration law which, unlike the New Jersey statute, barred all foreign corporations from suing in the State unless they complied with its registration requirements regardless of whether they were doing business in the State. Again, the suit attempted to be barred was to enforce an interstate contract, for money due on the sale of goods solicited and shipped in interstate commerce. Similarly, in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921), and *Furst v. Brewster*, 282 U. S. 493 (1931), the contracts which plaintiffs sought to enforce were contracts for the purchase or sale of goods in interstate commerce. The Court held plaintiffs were entitled to enforce such contracts without complying with the States' registration requirements. It did not appear that either plaintiff engaged in any localized activities in the State of the forum.

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530 (1888) and *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954), cited by appellant on page 24 of its brief, are not in point, for in both cases Congress had pre-empted the field which the States sought to regulate. See 125 U. S. 530 at 554; 348 U. S. 61 at 62 *et seq.*

Significantly, in each of the registration cases (except *Buck Store Co. v. Vickers*), the lawsuit which was barred was to enforce a contract made in interstate commerce. This was not the case in *Union Brokerage* and is not the case in the instant litigation.

Moreover, in none of the registration cases relied upon by appellant did the foreign corporation maintain an office in the State nor had it otherwise localized its activities to any appreciable extent. The importance of this distinction was recognized in *Union Brokerage Co. v. Jensen* wherein the Court distinguished the line of cases led by *International Textbook v. Pigg*, 217 U. S. 91 (1910), on the ground that "we have not here a case of a foreign corporation merely coming into Minnesota to contribute or to conclude a unitary interstate transaction." 322 U. S. 202 at 211. This is equally true with reference to Lilly's activities in New Jersey.

In an endeavour to lead the Court to believe that compliance with New Jersey's registration requirement will subject appellant to some extraordinary burden which appellant would not otherwise encounter in the prosecution of its business, appellant argues, first, that by designating a resident agent for service of process, appellant may subject itself to suits not falling within the "minimum contacts" rule of *International Shoe*, and cites *Davis v. Farmers Co-Operative Equity Co.*, 262 U. S. 312 (1923), for the proposi-

tion that the assertion of state jurisdiction in such cases is unconstitutional (brief, p. 24). As this Court made clear in *International Milling Co. v. Columbia Transportation Co.*, 292 U. S. 511, 517 (1934) and *Baltimore & Ohio R. Co. v. Kepner*, 344 U. S. 44, 51 n. 11 (1941), the *Davis* case must be strictly confined to its particular facts. Other courts have thus given a restricted reading to that decision. See *Moss v. Atlantic Coast Line R. Co.*, 157 F. 2d 1005 (C.A. 2, 1946), cert. den., 330 U. S. 839 (1947); *Harris v. American Railway Express Co.*, 12 F. 2d 487 (D. C. Cir., 1926); *Harrison v. United Fruit Co.*, 141 F. Supp. 35 (S.D.N.Y., 1956); *Standard Oil Co. v. Superior Court*, 44 Del. 538, 62 A. 2d 454 (1948), appeal dismissed for lack of substantial federal question, 336 U. S. 390 (1949).

In any event, appellant's contention that its registration in New Jersey would subject it to jurisdiction which, absent such registration, it could allegedly avoid, is not well taken. "It is established that a corporation, by seeking and obtaining permission to do business in a State does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States." *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 400 (1928). See also *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 496-7 (1923); *Canadian Pacific Ry. Co. v. Sullivan*, 126 F. 2d 433, 437 (C.A. 1) cert. den., 316 U. S. 696 (1942). Appellant suggests further that its registration in New Jersey would automatically subject it to the State's franchise tax (brief, p. 25). Both the state statute imposing the franchise tax, N.J.R.S. 54:10A-2, and the tax

regulation* promulgated thereunder, N. J. Corp. Tax Bureau, Regs. 16:10-1.130, make clear that the tax is imposed, among other things, on "the privilege of doing business, employing or owning capital or property, or maintaining an office, in the State." Thus, since appellant does business in the State and maintains an office in it, the franchise tax statute would apply to appellant whether or not it registers. Moreover the statute, unlike the regulation promulgated under it, makes no mention of registration. It follows that it is not the registration requirement which subjects appellant to the tax. Registration merely serves to notify the State of New Jersey of the corporation's presence in the State.

* Reg. 16:10-1.130:

"Every corporation, not expressly exempted, is deemed to have (or to have acquired) a taxable status under the act and is required to file a return and pay a tax thereunder, if it falls within any one of the following categories:

- "(a) existing under the laws of the State of New Jersey; or
- "(b) if a foreign corporation,
 - "(1) holding a general Certificate of Authority to do business in this state issued by the Secretary of State; or
 - "(2) holding a certificate, license or other authorization, issued by any other state department or agency, authorizing the company to engage in corporate activity within this state; or
 - "(3) doing business in this state; or
 - "(4) employing or owning capital in this state; or
 - "(5) employing or owning property in this state; or
 - "(6) maintaining an office in this state."

CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully submitted,

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February 8, 1961.

Proof of Service

I, one of the attorneys for Eli Lilly and Company, Appellant herein, hereby acknowledge receipt of a copy of the foregoing Brief of Appellee, Sav-On-Drugs, Inc., in the Supreme Court of the United States, this day of February, 1961.

FILE COPY

Office-Supreme Court, U.S.

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IN THE

JAMES B. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee,

and

STATE OF NEW JERSEY,

Intervenor-Appellee.

On Appeal From Judgment of the Supreme Court
of New Jersey

BRIEF OF INTERVENOR-APPELLEE,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee,

and

STATE OF NEW JERSEY,

Intervenor-Appellee.

On Appeal From Judgment of the Supreme Court
of New Jersey

Counter-Question Presented

Do the requirements of the New Jersey foreign corporation registration act, N.J.R.S. 14:15-3 *et seq.*, including the sanction of denial of access to sue in New Jersey courts on contracts made in New Jersey until registration is accomplished, create a reasonable demand upon a foreign corporation engaged in extensive local activity as part of its interstate commerce, when the State interests secured by the statutory requirements are legitimately designed to protect and inform the State and its citizens of the existence and character of the foreign corporation in the state, and when the local regulations do not conflict with or impede the federal constitutional right to engage in interstate commerce?

Summary of Argument

Eli Lilly, a corporation of the State of Indiana, is engaged in both inter and intrastate commerce. The interstate aspects include the manufacture of its products, and subsequent shipment and sale to wholesalers, including those located in New Jersey. In addition, as part of its interstate activity, Eli Lilly has entered into a number of fair trade agreements executed between Eli Lilly in Indiana and New Jersey retail druggists. Eli Lilly maintains an office in Newark, New Jersey and employs 18 detail men to promote its products and police its fair trade agreements as against both signers and non-signers. The conduct of its promotional activities constitutes intrastate commerce.

The New Jersey Foreign Corporation Act N.J.R.S. 14:15-3 *et seq.* requires all corporations transacting business in the State to register and file certain information related to the protection of the State and its citizens. Until such a corporation registers it is prohibited from maintaining an action in contract in the courts of this state. Eli Lilly has not registered despite the intrastate activity.

The trial court properly dismissed the action commenced by Eli Lilly.

The propriety of the trial court's action is evident, when the intensive local character of Eli Lilly's promotional activities are examined. That a state may regulate that part of interstate business carried on locally, is an accepted doctrine of this Court. *Paul v. Virginia*, 8 Wall, 168 (1868).

A second basis upon which the New Jersey statute may be applied to Eli Lilly, is grounded in the fact that the New Jersey Fair Trade Law, as applied to a non-signer, is so essentially local in character, as to constitute an expression of parochial activity, even for a corporation otherwise exclusively engaged in interstate commerce. *Sunbeam Corp. v. Winting*, 185 F. 2d 903 (3rd Cir. 1950); *Max Factor and Co. v. Koonsman*, 5 Cal. 2d 446, 55 P. 2d 177, 187 (1936).

Finally, even if it is found that the New Jersey foreign corporation act does, by its operation regulate interstate commerce, the act is so protective in its nature as to constitute regulation so reasonable in its application to Eli Lilly's local activity, as not to contravene the commerce clause of the United States Constitution.

Union Brokerage Co. v. Jensen, 322 U. S. 202 (1944).

Counter-Statement of Facts

Eli Lilly and Company, an Indiana corporation (hereinafter referred to as "Eli Lilly"), plaintiff-appellant, appeals from a final judgment of the Supreme Court of New Jersey affirming the dismissal of Eli Lilly's complaint in the New Jersey Superior Court, which sought to enforce the terms of the New Jersey Fair Trade Laws (N.J.R.S. 56:4-3), and more particularly its non-signer provisions (N.J.R.S. 56:4-6), by securing injunctive relief and monetary damages against the defendant-appellee, Sav-On-Drugs, Inc., a New Jersey corporation (hereinafter called "Sav-On") for allegedly selling Eli Lilly products below those minimum resale prices established by Eli Lilly.

The dismissal was based on the grounds that Eli Lilly, an Indiana corporation, had not yet complied with the provisions of N.J.R.S. 14:15-3 *et seq.* which requires, generally, that foreign corporations transacting any business in New Jersey file with the New Jersey Secretary of State a copy of its corporate charter and a statement containing (a) the amount of its authorized capital stock and the amount issued, (b) the character of the business to be transacted in the State, and (c) the principal office of the corporation in the State and the name of the registered agent upon whom process could be served. For failure to comply with the requirement, N.J.R.S. 14:15-4, Eli Lilly was prohibited from maintaining an action based upon the implied contract created by the non-signer provision of the New Jersey Fair Trade Law.

On appeal from the trial court, the New Jersey Attorney General intervened, in accordance with New Jersey Supreme Court Rule, R.R. 4:37-2, to defend the validity of a statute whose constitutionality was questioned. After certifying the cause on its own motion, the New Jersey Supreme Court affirmed the judgment of the Superior Court, Chancery Division, on the opinion below (R-47; 31 N.J. 591 (1960)).

Eli Lilly is the manufacturer of pharmaceutical products in the State of Indiana. Its products are shipped and sold to local wholesale distributors including those located in New Jersey (R-27). These products are then sold by the distributor to physicians and institutions, and to drug stores for resale to consumers (R-31, 33, 34).

In addition to selling to New Jersey wholesalers, Eli Lilly conducts a vigorous fair trade enforcement program in New Jersey, as authorized by the terms of the New Jersey Fair Trade Law, N.J.R.S. 56:4-3 *et seq.*, to control minimum resale prices charged by retail drug outlets to consumers. Eli Lilly is party to some 1500 fair trade agreements with New Jersey retailers (R-30), and, pursuant to the terms of N.J.R.S. 56:4-6, enforces the law as against non-signers who fail to observe the prices so fixed.

The defendant-appellee, Sav-On-Drugs, Inc., operates retail drug stores in New Jersey. It has not signed an Eli Lilly fair trade contract. It purchases Eli Lilly products from New Jersey wholesalers.

Eli Lilly conducts its general business in interstate commerce in that the manufacture, shipment and sale by contract originates in Indiana. At the same time, Eli Lilly carries on an extensive sales promotion and fair trade policing program in New Jersey. For this purpose Eli Lilly employs in New Jersey a district manager, secretary, and 18 employees called "detail men". All of these employees work out of a Newark, New Jersey headquarters

listed under the name "Eli Lilly and Company" in the building directory, on the office door, and in the Newark telephone book (R-23). While the lease for the Newark office space is paid by the district manager, Eli Lilly reimburses him for all the expenses incidental to the maintenance and operation of the office (R-28). All of its local employee's salaries are paid by Eli Lilly. The functions of the New Jersey office and the "detail men", to repeat, are to promote sales by visits to retail pharmacists, physicians and hospitals, to describe to Eli Lilly customers Eli Lilly products, to promote prescriptions of Eli Lilly products by physicians, to check stores and inventories of retail druggists in order to ascertain whether a sufficient supply of Eli Lilly products are carried to meet potential demand, to recommend the enlargement of the available supply, and, when the occasion demands, to transmit orders to wholesalers, to supply the retailers with advertising and promotional material (R-25, 26, 29), to urge pharmacists, physicians and hospitals to order Eli Lilly products from wholesale distributors (R-27) and to police fair trade practices established by Eli Lilly (R-26, 3, 5). This last function is performed in order to protect Eli Lilly's property rights in that good will which attaches to its trade mark products sold in New Jersey (R-1).

POINT I

Eli Lilly is engaged in intrastate commerce both as a matter of fact and law; the operation of the foreign corporations registration statute as against the activities conducted in New Jersey does not violate the Commerce Clause of the United States Constitution.

Although the main question presented to this Court is the proper dismissal by the lower court of Eli Lilly's fair trade suit by virtue of plaintiff-appellant's failure to register in New Jersey as a foreign corporation pursuant to

the requirement of N.J.R.S. 14:15-4, Eli Lilly advances a broader issue for consideration which extends beyond the statutory sanction imposed by the lower court. Not only does the Indiana corporation assert error based upon its denial of access to New Jersey Courts, but, also insists that its commercial operations as presented in the record before this Court immunized it altogether from the requirement of registration in New Jersey pursuant to N.J.R.S. 14:15-3 *et seq.* This assertion is made despite the fact that the only basis upon which it seeks a New Jersey forum is to enforce a right accruing to it exclusively by operation of the New Jersey Fair Trade Law as applied to non-signers, N.J.R.S. 56:4-6.

It is essential, therefore, to understand the primary purpose and function of the statute drawn in question. As will be demonstrated in detail in Point II, *infra* the foreign corporation registration law is a statute utilized to gain information from corporations, transacting any business within the State, for the protection and interests of State authorities and its citizens. It is not a licensing provision that is extended as a privilege to foreign corporations which seek to do business in the State. Its provisions denying access to the courts of the State are imposed solely in the case of failure to give the information required, in the face of intrastate activity. This must be distinguished from mere refusal to afford access to New Jersey Courts predicated upon a privilege to do business in the State. In this regard the trial court, considering both the primary thrust of the registration law and the undisputed facts relating to the extensive promotional and policing activities of local Eli Lilly "detail men" could come to no other logical conclusion than to hold that Eli Lilly was in fact transacting business in New Jersey. While it may be true that the "detail men" did not directly sell Eli Lilly products to the retail customers, the statute does not require sales as such to bring their activities within the definition

of "transacting business." The extensive promotional activities are so local in character and so intermeshed with the company's economic advancement that to construe these activities as separated from the corporation's eventual sales to the retail druggist, would derogate the purpose of the foreign corporation registration law. To accept the operation of the act in the posture presented by Eli Lilly would permit any company engaged in inter and intrastate commerce on a national basis to avoid legitimate local registration by merely separating its sales and promotion functions. There is no question that Eli Lilly is partially engaged in interstate commerce. At the same time it operates on an intrastate basis to a point where its activities must be considered as mixed inter and intrastate in character. That Eli Lilly was refused access to New Jersey Courts while endeavoring to enforce the terms of the New Jersey Fair Trade Law as against non-signers; that the character of this consequence is the dismissal of this particular suit, is of no constitutional concern when it is based simply upon the fact that Eli Lilly has been operating in New Jersey and has failed to register because of its intrastate activities. In other words there must be no equating of the amount of business performed in the State with the failure to have access to the Court on the simple issue of enforcing a fair trade contract. Both New Jersey reliance on private discovery through the mode of permitting a statutory defense to be raised where a plaintiff corporation has not registered, N.J.R.S. 14:15-4, in addition to the imposing of a penalty sanction if the State discovers a foreign corporation doing business without registry, N.J.R.S. 14:15-6, are reasonable efforts to obtain compliance with the terms of the law.

Considered in this light, the ambit of the statute, regulation of local businesses or that part of interstate businesses carried on locally, is the same type of regulation which even Eli Lilly admits to be proper. In their jurisdictional

statement at page 11, the defendant-appellants manifest agreement of the validity of the doctrine initially expressed in *Paul v. Virginia*, 8 Wall, 168 (1868), which stands for the proposition that foreign corporations engaged in both inter and intrastate commerce must conform to local regulations while actually engaged in commerce within the State. See *Diamond Glue Company v. U. S. Glue Company*, 187 U. S. 611 (1903); *Interstate Amusement Co. v. Albert*, 239 U. S. 560 (1916); *Cheney Bros. v. Mass.*, 246 U. S. 147, 154-155 (1918); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959).

It is not necessary, however, to rest here. Even if the local promotional activities were considered to be so coupled with interstate commerce so as to be distinguishable as a matter of fact from the *Paul* doctrine, the use of the statutory fair trade enforcement policy as applied to non-signers is the use of a measure so local in character as to constitute intrastate activity by operation of law, requiring registration. This would result of course in the constitutional propriety of the statutory registration requirement and dismissal of the suit under review. For the purpose of argument it may be conceded that Eli Lilly conducts no promotional activities in the State of New Jersey; that it does not have an office here; that it merely executes contracts for the sale of its trade marked products in Indiana with New Jersey wholesalers calling for the shipment and sale of Eli Lilly products to said wholesalers in this State and, in addition, that it executes fair trade agreements in Indiana with New Jersey retailers to uphold its minimum retail prices. It may be even conceded that such fair trade contracts are executed in New Jersey. If the foregoing are true, then, under each of these hypotheses Eli Lilly, without any intrastate activity or local contract, is engaged exclusively in interstate commerce and suits arising directly out of such commerce could not be dismissed for failure to register. But cf. *U. S. Time Corp. v. Grand Union*

C. 64 N. J. Super. 39 (Chanc. 1960) where the trial court saw fit to distinguish the holding of *Eli Lilly* from activities regarded as being exclusively interstate in character.

However, a suit against a non-signer by operation of the New Jersey Fair Trade Law N.J.R.S. 56:4-6 does not concern an interstate transaction but rather, by virtue of its peculiarly local application, must be considered local in character. *Sunbeam Corp. v. Wenting*, 185 F. 2d 903 (3rd Cir. 1950). The background of the fair trade laws as refined by the congressional intent expressed in the McGuire Act, as a matter of fact and law, require the conclusion that fair trade enforcement as applied to non-signers, is an intrastate matter. Section 1 of the McGuire Act, 66 Stat. 632 (1952), 15 U.S.C.A. sec. 45 states that:

"That it is the purpose of this Act to protect the rights of states under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

The operation of local fair trade laws against non-signers as sanctioned by the McGuire Act, *supra*, has always been regarded as local in operation and applying " * * * only to transactions within this state, that being the sole territorial extent of the legislature's powers." *Max Factor and Co. v. Koonsman*, 5 Cal. 2d 446, 55 P. 2d 177, 187 (1936). Such a conclusion is buttressed by the refusal to enjoin sales beyond state borders pursuant to non-signer

provisions under a state fair trade law. *Sunbeam Corp. v. Wenting, supra*; *Johnson & Johnson v. Weissbard Bros.*, 11 N. J. 552 (1953).

It is in this light that *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910) and the cases following, relied on by Eli Lilly must be considered and distinguished. Each falls into a pattern, the rule of law of which has been considered and conceded for the purpose of argument above in comparing Eli Lilly's actual local activities with a hypothesized exclusive interstate operation. Where a foreign corporation is suing on a transaction which arises out of interstate commerce, it cannot be denied access to state courts in an action to enforce the transaction that was part of the interstate commerce of the complainant. Thus, *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910) involved the enforcement of a contract relating to the sale of books in interstate commerce. *Buck Stove and Range Co. v. Vickers*, 226 U. S. 205 (1912), dealt with a suit on a fraudulent conveyance that arose directly out of interstate commercial activity. So did the transaction that gave rise to the suit in *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914), as did the actions in *Dahnke-Walker Co. v. Bundurant*, 257 U. S. 282 (1921) and *Furst v. Brewster*, 282 U. S. 493 (1931).

Therefore, it is urged that as a matter of fact, as related to the distinct admitted local activities of Eli Lilly in the State of New Jersey, and, by operation of law through a suit to enforce a fair trade statute against a non-signer, the activities conducted by Eli Lilly and sought to be controlled by it, are exclusively local in character and, hence, the operation of the New Jersey foreign corporation registration statute was constitutionally applied by the trial court.

POINT II

If Eli Lilly is regarded as being in interstate commerce the conditions imposed by N.J.R.S. 14:15-3 *et seq.* are entirely reasonable.

Despite the characterization of privilege given to the foreign corporation registration statute by Eli Lilly (Ab17), a careful analysis of the act will demonstrate clearly its manifest protective purpose:

N.J.R.S. 14:15-3 requires that every foreign corporation except banking, insurance, ferry and railroad corporations *** before transacting any business *** in New Jersey file with the Secretary of State:

- (1) a certificate of incorporation, attested by its president and secretary, under its corporate seal, and
- (2) a verified statement setting forth:
 - (a) the amount of its authorized capital stock and the amount actually issued;
 - (b) the character of the business which it is to transact in this state;
 - (c) the principal office of the corporation in New Jersey together with the name of an agent authorized to accept service of process.

Once such a statement has been filed, the terms of this section make it mandatory upon the Secretary of State to issue a certificate of authority to transact business. In addition, the Secretary of State is charged with the responsibility of determining, through an examination of the information so filed, whether the purposes for which the corporation has been formed, and which are set forth in the corporate charter, are such as may be lawfully transacted within this state. For failure to obtain such a cer-

tificate, a corporation is prevented from maintaining an action upon any contract made by it in this state. In addition, a corporation is subject to a penalty of \$200.00 for transacting business without the necessary certificate.

Despite Eli Lilly's mistaken label of purpose, it is essentially a regulation to protect the state and its citizens as regards activities carried on by corporations domiciled outside of this state when they see fit to pursue their purposes for profit in New Jersey. Whether a corporation is engaged in interstate commerce, mixing inter- and intrastate commerce or, as is urged in Point I, separate intrastate activities, the State of New Jersey has a constitutional and legitimate right to know generally who a corporation is, whether it intends to act lawfully and in accordance with New Jersey laws, and whether it will be subject to process here. It is a regulation of local activity, designed to insure that the laws will be observed and if not, that there will be a presence of corporate responsibility within the state.

This statutory design aimed at regulating the localized activities of a foreign corporation has been approved by this court as having the same validity as other types of police power exercised over intrastate activity carried on by persons engaged in interstate commerce. *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) should control the case at bar. Minnesota imposed requirements upon foreign corporations, similar to those contained in the New Jersey Act. A foreign corporation, engaged in the customs brokerage business and subject to the federal customs laws, instituted an action in Minnesota for breach of a fiduciary relationship which was dismissed for failure to register there as a foreign corporation. This court, in upholding the local law as against the foreign corporation, after ruling that the state statute did not conflict with the federal customs laws, applied the well-settled test of determining to what extent state interests affected the pursuit of interstate activity locally. The Court balanced the demand made by the

state as against the nature of the transactions or activity conducted locally in applying the registration statute, in addition to determining whether the local requirement could be harmonized with the national interest of affording freedom to conduct interstate commerce. On these principles the Court observed that Minnesota was legitimately concerned with the interests of its citizens who dealt with foreign corporations doing business locally. The Court then stated at p. 210 of 322 U. S. that:

"The incidence of the particular state enactment must determine whether it has transgressed the power left to the states to protect their special state interests although it is related to a phase of a more extensive commercial process.

"The information here sought of all foreign corporations by Minnesota as a basis for granting them certificates to do business within her borders is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State. Apart from any question of interference with foreign commerce such a requirement is plainly within the regulatory power of a State. *** The burden, such as it is, falls on foreign businesses that commingle with Minnesota people, and the burden, a fee of fifty dollars, is sufficiently small fairly to represent the cost of governmental supervision of foreign business enterprises coming into Minnesota. In short, it is a supervisory and not a fiscal measure. As such it imposes costs upon the State which those who are supervised must, as is often the case, themselves pay."

And, further at p. 212 that:

"The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign com-

merce. To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause. By its own force that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration. And so we conclude that in denying Union the right to go to her courts because Union did not obtain a certificate to carry on its business as required by the Foreign Corporation Act, Minnesota offended neither federal legislation nor the Commerce Clause."

The standards expressed above lend emphasis to the constitutional objectives of the requirements under review. In this regard, the foreign registration statute is no more than a reasonable instance of the imposition of local regulations over localized interests of persons engaged in various types of interstate commerce. The registration statute has as much of a legitimate purpose as do regulations over the safety of vehicles using local highways, insurance salesmen and importation of deleterious substances. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938); *Robertson v. California*, 328 U. S. 440 (1946); *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). And such regulations, as will be more fully demonstrated below, are not designed to exclude foreign corporations from doing business locally when there is a failure to achieve a specific standard of solvency, or a status that the local state has no power to control, *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

Rather, in accordance with *Union Brokerage v. Jensen*, *supra*, the demand by New Jersey, of requiring foreign corporations transacting business locally to register is legitimate. Each requirement to supply certain information is related to the objective of affording protection and data necessary to the state and its citizens. Additionally, the local demand does not conflict in any way with Eli Lilly's nationally protected interest of furthering its business activities in interstate commerce.

As indicated above, the corporate charter when filed insures that the purposes and aims of the corporation as stated do not contravene the laws of this state. The ability to examine the charter insures the impartation of legitimacy to any corporation whose business affairs will be conducted within the State of New Jersey. Absent the necessity of such corporate revelation, a business association might conduct its affairs, through subterfuge, in the guise of a corporation and thus enjoy the legitimate benefits accruing to a foreign corporation without in fact being one. The obvious effect that such a method of operation would have upon the rights of the citizens of this state who dealt in good faith with such an organization, need not here be enumerated. The corporate charter would also reveal if a corporation properly organized had as a stated purpose for its existence an activity proscribed by the laws of this state. By this means the state insures to its citizens freedom from those activities which although lawful in the state of incorporation are deemed here in New Jersey to run afoul of the standards for legality demanded of a domestic corporation. These might include corporations organized for the purpose of running gaming establishments, or conducting business which, though lawful, must be subject to licensing control, i.e., insurance, banking, sales of intoxicating liquors.

Information of this sort should be available also in order to enable persons dealing with the corporation to determine

whether the corporation has the power to transact business in the manner the parties intend; for example, a sale of land might be beyond the corporate powers as expressed in the charter. This same protective necessity is found in the requirement that the statement which must be filed by the foreign corporation shall show the amount of its authorized capital stock and the amount actually issued. It is a matter of record that certain states have declared that it is unlawful for a domestic corporation of that state to issue stock in excess of its authorization. Fletcher, *Cyclopedia of the Law of Private Corporations*, 255 (Sec. 5129), 327 (Sec. 5144). To allow a corporation of one of these states to violate the laws of its home state and yet conduct with impunity its business here, would be to subject the citizens of the State of New Jersey to an unreasonable assault upon their full right to a knowledge of the parties with whom they will deal in the local conduct of their affairs. The requirement that the statement filed by the corporation shall set forth the character of the business is necessary to prevent misinterpretation of the purposes of that business as set forth in the corporate charter, and also insure that where a corporation has several purposes, some of which are illegal in this state, only those allowable functions are carried on.

Information expressed in the statement is vital to state authorities to enable them to ascertain corporate presence within the state for subjection to tax laws or regulatory statutes such as our Workmen's Compensation and Unemployment Compensation Laws, if such taxes and regulations can be applied as a matter of fact and law. In this regard, Eli Lilly's characterization (Ab25) of the automatic nature of imposed taxation is untrue. While that issue is not present here, nevertheless, appellants omission of the basis for taxation should be pointed out. The statute, N.J.R.S. 54:10a-6,8 and appropriate rule New Jersey Corporation Tax Division Reg. 16:10-1.160 which follows the general rule, cited by Eli Lilly, subjecting foreign corporations doing business in this state to taxation on business

done here, specifically establishes a formula which delineates the criteria which must first be examined to determine the extent, if at all, the corporation is so subject. It is to be noted that the filing of such information is in no wise in excess, and indeed is less, than that imposed on domestic corporations.

This statute is designed not only to afford, through its protection, benefits to the citizens of the State of New Jersey; foreign corporations by registering are benefitted thereby. It must be stressed that New Jersey through the operation of N.J.R.S. 14:15-3 *et seq.*, is not concerned in particular with the activities in this state of Eli Lilly. It is concerned with all foreign corporations which have access to this State, including those corporations, persons acting under alleged corporate authority, persons holding themselves out as corporations, as well as corporations who are not in fact such in a foreign state of purported registry. It is designed to assure:

*** responsibility and fair dealing on the part of foreign corporations coming into a state *** *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 210 (1944).

It is not beyond speculation to assume that the registration of a foreign corporation in this state offers a self-imposing confidence in cases where persons desiring to know of the veracity of a corporate representation have access to public information provided by the Secretary of State of the corporate existence, its state of domicile, and that it is acting in a lawful manner. For example, if a citizen of the State of New Jersey were approached by a salesman representing himself to be from a foreign, or even a domestic corporation, and the prospective buyer, beset with doubt as to possible fraud, questioned whether a transaction could be legally consummated, what better means could be found of assuring corporate legitimacy to the citizen than through this information filed with the Secretary of State. In this

regard, if a corporation is legitimate and an inquiry may be made, the local citizen would be far more likely to enter into such a transaction than if such information was not available to satisfy his inquiries. Such a benefit is akin to the quality afforded by a trademark. Additionally, the validity of the statute and its application here afford Eli Lilly, together with all other corporations including its competitors, access to information regarding the corporate activities of each other. If such a statute, or its application, were declared to be invalid the information would not be available and no foreign corporation could ascertain with any certainty the extent to which another corporate entity was operating in New Jersey.

One other aspect of the New Jersey foreign corporation registration act must be considered, in addition to its protective and beneficial functions. N.J.R.S. 14:15-3(e) provides for the appointment within this State of a registered agent upon whom process may be served. Appellant seeks to make much of this provision, both by its claim that *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905) provides that the New Jersey statute subjects a foreign corporation to the state's general jurisdiction, and, by its claim that such a provision, rendering a foreign corporation amenable to suit, is unnecessary in the light of the minimum contacts rule of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945) and *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957).

As to both contentions Eli Lilly is in error. *Groel* merely interpreted the effect of the 1894 statute, as regarded the service of process; it was not designed to confer any greater jurisdiction than had previously obtained. Certainly, it conferred no general jurisdiction.

As to the second contention, Eli Lilly asserts that since the decisions in the *Shoe* and *McGee* cases, it is no longer necessary to provide a statutory means to insure corpo-

rate presence within the state for the purpose of service (Ab21). Aside from this tacit admission of pre-1945 necessity for such a statute, appellant in this argument advances no other support for this proposition other than those cases which find sufficient contact to permit service without a violation of due process. New Jersey, it is thus contended, may afford, by statute, no means to its citizens to effect service on foreign corporations, because any attempt to do so would be to unreasonably burden interstate commerce.

That the State may, through the exercise of its police power enforce measures designed to afford convenience to its citizens is a doctrine long approved by this Court. *C. B. & Q. Ry. Co. v. Drainage Commr.*, 200 U. S. 561, 592 (1906). Since then, as Eli Lilly admits is here the case, there existed a necessity for providing, before 1945, some method by which the citizens of New Jersey might serve process upon a foreign corporation when appropriate, statutory provisions therefor must be considered both protective and convenient. Nor does the advent of *Shoe* and *McGee* act to preclude the State from providing for its citizens this convenient and appropriate means of effecting service. Certainly the jurisdiction here imposed is no greater than that afforded by the minimum contact rule. Moreover, this Court has said that the mere existence of an alternative method of proceeding will not serve as a basis for striking down the method used, if interstate commerce is not unreasonably burdened thereby.

"These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that the total effect of the law as a safety measure is so

slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it' (Southern Pacific Co. v. Arizona, *supra*, pp. 775-776) we must uphold the statute."

Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 524 (1958).

As may be seen by the foregoing analysis of the New Jersey statute, and by the clear showing of protection, benefit and, where appropriate, convenience, Eli Lilly's contention that the statute creates a direct burden on interstate commerce is not impressive. To comply with the requirements all that is required of Eli Lilly is paper work, an unassuming demand at most.

All of these reasons support the historically valid constitutional principle that a regulation of any type that affords local protection and is applied to activity that is carried on within a state and not beyond its borders, if not burdensome to interstate commerce, will be sustained in its application. This is so notwithstanding the interstate character of the corporation coming within the purview of the regulation.

To repeat, the erection of reasonable burdens upon a corporation engaged in interstate commerce, insofar as local activity is concerned, has been recognized as constitutionally proper, *Union Brokerage v. Jensen, supra*. Even cases relied upon by the appellant as dictating an opposite result in this cause are consistent with this proposition.

In *International Text Book Co. v. Pigg*, 217 U. S. 91 (1910) this Court held unconstitutional the application of the Kansas Qualification Statute which required the filing of information clearly onerous and beyond the power of the Kansas Legislature to control. That statement as required by Section 1283 of the Kansas Statute, demanded informa-

tion relating to authorized capital stock, paid up capital stock, par value and market value per share of the stock, a detailed statement of assets and liabilities of the corporation, and in addition, a full and complete list of the stockholders together with their addresses and the number of shares held and paid for by each. This was the sole unconstitutional feature of the Kansas Statute which caused this Court to upset its operation as against the Pennsylvania Text Book Company seeking to enforce a contract arising directly out of interstate commerce. Indeed a close analysis will demonstrate that the non-access provisions of the Kansas Statute were not declared to be unconstitutional as such; that the prohibition which caused the dismissal of the Kansas suit by the Pennsylvania corporation was declared to be constitutional as a matter of statutory construction only because this Court found no basis for separating this provision from the onerous and unreasonable part of the statute. In addition, it might be pointed out that the Kansas Charter Board, by the terms of this statute, had discretion to approve the application based on its findings of solvency.

The New Jersey requirements are completely distinguishable. The terms of the statute make it mandatory that the Secretary of State issue the certificate once the statement has been filed. The terms of the New Jersey requirements, as heretofore illustrated, do not require information that is beyond the New Jersey Legislature's power to control. For instance, New Jersey demands nothing in the way of information regarding either corporate solvency, or the names, addresses and amounts of shares held by each shareholder. In fact, while New Jersey, pursuant to another section of its corporation law (the annual report to be filed by both domestic and foreign corporations doing business in this State (N.J.R.S. 14:6-2(g))), demands that each corporation file a statement affirming the fact that it has displayed at the entrance of its registered office the name of

the corporation, and that the books of the corporation be kept at that office, open at all times to the examination of its stockholders (including a stock transfer book containing the names and addresses of the stockholders and the number of shares held by each), nevertheless, the state recognizes its own limitations in regard to foreign corporations, and specifically exempts the application of this requirement to foreign corporations and those types of corporations which are regulated by separate statutes. This is indicative of the practice of self-restraint that was absent in Kansas. In addition, as was asserted in Point I, *supra*, the suit sought to be maintained in the Kansas Court arose directly out of an interstate transaction which is not the case here. The *Pigg* case on its facts, therefore, is completely distinguishable from the instant case both as to the standard of law regarding local regulation and as to the character of the transaction that was the subject of suit.

In *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912), this Court held that the same Kansas Statute considered in *Pigg* could not be used to deny access to the plaintiff for the reasons expressed in *Pigg*. In addition, the suit on a fraudulent conveyance of land arose directly out of interstate activities on the part of the plaintiff.

Sioux Remedy v. Cope, 235 U. S. 197 (1914) is not helpful to support the thesis advanced by Eli Lilly that it is completely immune from the requirements of the New Jersey foreign corporation registration statute. The South Dakota statute required that any foreign corporation transacting business in that state was prohibited from (1) acquiring, holding or disposing of real, personal or mixed property within the State, and (2) suing or maintaining any action at law or otherwise in any of the courts of South Dakota. These prohibitions continued until it filed a copy of its corporate charter with the Secretary of State. Further, no action could be commenced or maintained upon

any contract, agreement, or transaction made or entered into in South Dakota by the corporation unless that foreign corporation appointed a resident agent upon whom process could be served in any action to which it was party. Those demands as compared with the requirements of the New Jersey statute are burdensome as applied to a foreign corporation endeavoring to maintain an action arising directly out of interstate commerce, in the *Sioux* case a suit to enforce the payment of the purchase price for merchandise sold and shipped from Iowa into South Dakota. The specific terms of the South Dakota statute required submission to general jurisdiction in return for the right to do business in that State. In addition, a corporation engaged in interstate commerce was expressly prohibited from acquiring or disposing of any type of property. Those conditions patently imposed a direct burden on interstate commerce; one which lacked any reasonable relationship to a registration statute considered to be informational in character. Not only was access denied to South Dakota courts, but moreover, intrastate transactions were specifically prohibited and could be considered as unlawful and void in the light of the property transfer qualifications imposed prior to registration. Compare these statutory conditions with those of New Jersey. New Jersey does not prohibit interstate transactions as such nor does it condition the sale of property in the state by a foreign corporation upon registration. Indeed, the suit limitation applies only to contracts made within this State and not to interstate transactions as such (see opinion of court below (R-42) regarding the intrastate connotation of the fair trade suit which is based on a contractual relationship created by operation of law). This court, in fact, recognized in *Sioux* the right of a state to enact reasonable measures to promote the health, safety, morals and welfare of its people even though interstate commerce be incidentally or indirectly affected thereby. At the same time a state cannot impose conditions with respect to the carry-

ing on of interstate commerce, or to transactions arising therefrom, when such conditions are unreasonable or reach beyond the bounds of suitable local protection, *Id.*, at pages 203-205 of 235 U. S. Therefore, while *Sioux* found that no relationship existed in refusing access for failure to submit to the general jurisdiction in any type of suit because this restriction exceeded local power to regulate interstate commerce, it did not forbid the imposition of reasonable requirements which, it is urged, are present in the New Jersey law. Again, as asserted in Point I, *supra*, it is conceded that a corporation engaged in interstate commerce which seeks to enforce a contract arising out of an interstate transaction cannot be precluded from gaining access to New Jersey courts for the purpose of pursuing its right which is based on its interstate activity. This is far different, however, from the problem as presented here where, as a consequence of failing to register, Eli Lilly is prohibited from maintaining an action arising by virtue of New Jersey law that is not connected with interstate commerce, but with exclusively local promotional and fair trade policing activities. The same principle that caused the Kansas statute in *Pigg* to be unconstitutional as applied to interstate transactions is applicable also to *Sioux*. South Dakota by operation of its qualification statute could not control or condition the interstate commerce activities of Iowa corporation in *Sioux*.

Furst v. Brewster, 282 U. S. 493 (1931) should be considered in the same light. Aside from the fact that the plaintiff's suit was dismissed because it arose directly out of an interstate transaction, the Arkansas statute required information relating to matters beyond the control of the local legislature. A statement of the plaintiff's assets and liabilities in addition to the amount of capital employed in the local state was required from the foreign corporation, together with the designation of a general office or place of business in the local state, as well as the name of an

agent upon whom process could be served. This statute, too, far exceeded the power of control which the local legislature could effect upon a foreign corporation and, as measured against the New Jersey statute is far more offensive in addition to imposing unreasonable burdens.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921), is distinguished. It stands for the conceded proposition that, as a matter of fact, a suit arising directly out of interstate commerce cannot be dismissed for failure to register. The court did not consider, or criticize the requirements of the local statute as it applied to the activities of a foreign corporation.

From a reading of all the cases cited by appellant and especially those which are stressed in support of the alleged assertion that the New Jersey registration statute as a whole cannot, in its operation be applied to Eli Lilly under any circumstances, it is urged that an analysis of the reasons supporting the existence of the sanctions, in addition to placing in proper perspective that sanction which has caused a dismissal of the action under review, demonstrates that the statute on its face, and as applied to Eli Lilly, only indirectly affects its interstate activities. Furthermore, even that application does not unreasonably burden the furtherance of Eli Lilly's right to do intrastate business in New Jersey in furtherance of its interstate activities.

CONCLUSION

The Court below correctly applied the sanction of non-access to Eli Lilly in view of its failure and refusal to provide by registration, appropriate information designed to protect and serve the interests of the State and its citizens. Eli Lilly cannot complain of such a reasonable requirement in light of its avowed New Jersey activity. Therefore, it is respectfully submitted that the judgment below be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1960.

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC. AND STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

REPLY BRIEF FOR APPELLANT ELI LILLY AND COMPANY.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1960.

No. 203.

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC. AND STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

**REPLY BRIEF FOR APPELLANT
ELI LILLY AND COMPANY.**

The concessions made in appellees' briefs, expressly and by not attempting to deal with points advanced by appellant, leave clear the unconstitutionality of the New Jersey statute as here applied. As to their contention that appellant is engaged partly in intrastate commerce, appellees now concede that they have raised a new point on this appeal but seek to justify it on a basis ruled out by decisions of this Court. In addition they make no attempt to refute appellant's showing that factual differences, and subsequent decisions of this Court render inapplicable the *Cheney* case, on which appellees place sole reliance. Their

concession that a state may not bar a suit arising out of interstate commerce in itself calls for reversal here since the present fair trade suit is clearly of that character.

On the question whether a state can constitutionally apply its qualification statute to a foreign corporation engaged only in interstate commerce appellees cite not a single decision which has ever so held. Long standing decisions to the contrary cited by appellant are neither differentiated, claimed to have been overruled, nor requested to be overruled. Appellees have neither shown that the state has the power it here asserts nor refuted appellant's showing that the statute burdens interstate commerce without serving any real state purpose.

ARGUMENT.

I.

Appellees' Contention that Appellant is Engaged Partly in Intrastate Commerce is Insupportable.

A. The contention that appellant does intrastate business in New Jersey raises a new question on appeal and need not be considered.

Appellees do not deny that their intrastate commerce contention is a new one not raised below. Intervenor makes no attempt to justify it. Appellee Sav-On seeks to excuse it on the ground that the Court "is free to affirm a judgment upon any ground which has support in the record" (Br. p. 7); but all the cases it cites are cases coming from the federal courts and therefore inapplicable, as pointed out in *Blair v. Oesterlein Mach. Co.*, 275 U. S. 220, 225 (1927). In the *Blair* case, in declining to consider a new

argument raised on appeal, the Court stated the rule as follows:

"It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here."¹

B. Appellant's promotional activities in New Jersey are part of its interstate business.

Both appellees concede that appellant is engaged in interstate commerce in New Jersey, but they would artificially sever from that commerce appellant's activities in the state designed to promote the sale of its goods in interstate commerce. This unrealistic position is based entirely upon the fact that appellant's detail men engage in promotional activities at the retail level whereas appellant sells directly only to wholesalers.

Advertising and promotion by an exclusively interstate seller are inseparable from the interstate business. Building consumer demand and persuading retail dealers to carry the manufacturer's products on their shelves are prerequisites to the movement of goods from the factories

* The rule of the *Blair* case was reaffirmed in a later case holding that the Court will not entertain a new argument on appeal in support of the judgment of a state court. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940). To the same effect are *Virginian Ry. v. Mullens*, 271 U. S. 220, 227-28 (1926) and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). See also ROBERTSON & KIRKHAM: JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §61 (1951 ed.). The five cases cited by appellees are distinguishable also in other respects. In three of them the contention raised on appeal had been advanced below but rejected. *Jaffke v. Dunham*, 352 U. S. 280 (1957); *Langnes v. Green*, 282 U. S. 531 (1931); *United States v. American Railway Express Co.*, 265 U. S. 425 (1924). In the fourth case the Court rejected an attempt by the respondent to attack a judgment as to which he had not sought review. *Le Tulle v. Scofield*, 308 U. S. 415 (1940). The fifth case was a tax case in which the basic issue, the existence of a tax deficiency, had been raised below. *Helvering v. Gurran*, 302 U. S. 238 (1937).

into the stream of commerce. Virtually every interstate corporation engages in advertising and promotion of one kind or another. In the ethical drug industry of which appellant is a part, detail men are the accepted means of informing physicians, hospitals and druggists about drug products, since they are not sold or advertised directly to the consuming public. See *Hoffmann-LaRoche Inc. v. Schwegmann Bros. Giant Super Markets*, 122 F. Supp. 781, 782-83 (E. D. La. 1954).

The concept of isolating promotional activity from the interstate sales promoted is so artificial that even intervenor, inadvertently perhaps but significantly, describes appellant in its "Counter-Question Presented" as "a foreign corporation engaged in extensive local activity as part of its interstate commerce" (Br., p. 1). Intervenor also refers to the "ambit of the statute" as including regulation of "that part of interstate businesses carried on locally" (Br., p. 7). Obviously, all interstate business has to be carried on in one state or another. Local activity is necessary to carry on interstate as well as intrastate business.

The argument that promotion of interstate sales constitutes intrastate business was rejected in the original "drummer case"—*Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (1887). Refusing to hold that solicitation is local activity distinct from interstate sales, the Court pointed out that a manufacturer can not be expected to "sit still in his factory or warehouse, and wait for the people of those states to come to him. This would be a silly and ruinous proceeding" (120 U. S. at 494-95). An argument that promotional activities were separable from the interstate commerce promoted was also found deficient in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939). There a Washington tax had been upheld by the

state court on the theory that, although the taxpayer's shipments of fruit were interstate, its activity in Washington in "promoting the commercee" was a local business. This Court reversed, pointing out that the promotional activity was in aid of the ~~interstate~~ sales.

Advertising at the consumer level by an interstate seller was held to be an integral part of interstate commerce in *Ford Motor Co. v. FTC*, 120 F. 2d 175 (6th Cir. 1941), *cert. den.* 314 U. S. 668. In rejecting an argument to the contrary based on the fact that the advertising related to "purely intrastate transactions"—sales by local dealers to the public—the Court of Appeals said:

"The use of advertising as an aid to the production and distribution of goods has been recognized so long as to require only passing notice. The economy of mass production is just as well known and the effects of advertising may be described as mass selling without which distribution would be lessened and a fortiori production correspondingly decreased. The present advertisement of the method for financing the purchase of petitioner's cars on credit was an integral part of their production and distribution" (120 F. 2d at 183).

In *Progress Tailoring Co. v. FTC*, 153 F. 2d 103 (7th Cir. 1946) the Commission had issued a cease and desist order against false advertising designed to solicit salesmen for an ~~interstate~~ seller. In affirming the order and rejecting the contention that the advertisements were detached from interstate sales, the Court of Appeals said:

"The advertisements are a part of the preliminary negotiations leading up to a sale in interstate commerce. They cannot be separated from the final sale, and are themselves a part of interstate commerce" (153 F. 2d at 105).

Appellant is aware of no qualification case, and appellees have cited none, holding that promotional activities require an interstate seller to comply with a state qualification statute. On the contrary the courts have consistently held in such cases that promotional activities, including those at the retail level by interstate sellers to wholesalers, are part of interstate commerce. *Wera Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cas. par. 69,639 (Minn. Dist. Ct.); *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959); *Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cas. par. 69,195 (R. I. Super. Ct.); *Waggener Paint Co. v. Paint Distributors, Inc.*, 228 F. 2d 111 (5th Cir. 1955); *State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946); *Victor Talking Mach. Co. v. Lucker*, 128 Minn. 171, 150 N. W. 790 (1915); and *Maury-Cole Co. v. Lockhart Grocery Co.*, 173 S. W. 262 (Tex. Civ. App. 1915).

This recognition of promotional activities as a part of interstate commerce is only an application of the general principle that local activities cannot be regarded as separable from interstate commerce unless they constitute local business transactions economically distinct from interstate sales. Compare *Yark Mfg. Co. v. Colley*, 247 U. S. 21 (1918) and *Dozier v. Alabama*, 218 U. S. 124 (1910) with *General Railway Signal Co. v. Virginia*, 246 U. S. 500 (1918) and *Dalton Adding Machine Co. v. Virginia*, 246 U. S. 498 (1918); see *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 468 (1959). If, in addition to its interstate sales, the corporation engages locally in commercial transactions which are separately remunerative, the local activity can be regarded as separable from interstate commerce, but advertising, promotion, and solicitation of orders by an interstate seller are not transactions that produce income or

economic benefit apart from the interstate sales to which they contribute.

The only case cited by appellees in support of their contention is *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918). Appellant has shown in its main brief (pp. 29-31) the sharp contrast between *Cheney* and the present case. Not only did *Cheney* involve a different question—taxation rather than qualification—but the facts were markedly different. There the corporation had qualified to do a local business and maintained a stock of goods and a general business office in the state where orders were accepted. In addition, the major part of its business was found to be that of furnishing salesmen to act as agents of local wholesalers in the regular solicitation of orders from local retailers.

The *Cheney* case must be regarded as having been limited by *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959). Appellees have chosen to remain silent about that case, and the Act of Congress which followed it, although the important bearing of both was discussed in appellant's main brief (p. 31).

In sum, appellant's only business, and the sole source from which it derives any revenue or economic benefit, is the interstate sale of ethical drugs. Its promotional activities directed at stimulating demand for those drugs has no purpose or significance apart from the interstate sales.

C. The present suit arises from interstate commerce and cannot be barred.

Appellees have not rebutted appellant's contention that even if it were doing some intrastate business in New Jersey the decision below would have to be reversed.

It is expressly conceded by intervenor (Br. p. 10) and apparently by appellee Sav-On as well (Br. p. 9) that

even though a foreign corporation does some intrastate business, a state cannot bar a suit relating to its interstate business. *Furst v. Brewster*, 282 U. S. 493 (1931) is a clear holding to this effect.*

Having made this concession, appellees proceed to argue that the present suit does not arise out of interstate commerce because it is a suit for fair trade enforcement. This argument does not stand analysis. That fair trade enforcement by an interstate seller is part of the interstate marketing arrangement was established by *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951). Many state courts, including the highest court of New Jersey, have reached the same conclusion.** Indeed the New Jersey decision on the point, *Johnson & Johnson v. Weissbard*, 11 N. J. 552, 95 A. 2d 403 (1953), following the *Schwegmann* case, vacated state court injunctions granted in the earlier

* Appellee Sav-On is mistaken in saying that the corporation in the *Furst* case was engaged exclusively in interstate commerce. The state court found that the foreign corporation was engaged in intrastate commerce through its agent Brewster who made local sales. This Court held that even if Brewster was the agent of the corporation in making intrastate sales, the contract between Brewster and the foreign corporation was an interstate transaction and enforceable despite the corporation's failure to qualify (282 U. S. at 496-97).

Appellee also misinterprets a statement made in appellant's Jurisdictional Statement concerning the validity of qualification statutes as applied to intrastate commerce (Br. 5). The point is that qualification statutes are valid if applied solely to intrastate commerce, but not when applied to interstate commerce as well as intrastate. *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

** *Johnson & Johnson v. Weissbard*, 11 N. J. 552, 95 A. 2d 403 (1953); *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959); *Weco Products Co. v. G. E. M., Inc.*, 1966 CCH Trade Cas. par. 69,639 (Minn. Dist. Ct.); *Seagram Distillers Co. v. Corenswet*, 198 Tenn. 644, 281 S. W. 2d 657 (1955); *Fromm & Sichel, Inc. v. Zimmerman*, 1956 CCH Trade Cas. par. 68,362 (D. Ill.); *Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cas. par. 69,195 (R. I. Super. Ct.).

New Jersey case relied on by the appellees here, *Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585, 191 A. 873 (Ct. Err. & App. 1937). In the later *Johnson & Johnson* decision, in holding that the fair trade program of an interstate seller was part of interstate commerce, the Supreme Court of New Jersey said (11 N. J. at 557-58, 95 A. 2d at 406):

"The sales to the consumer on the local level are of the very essence of the interstate process. The retail market is the outlet for goods distributed in interstate commerce under a uniform price formula designed, as just said, to afford nationwide protection of plaintiff's good will. There is no discernible line of separation between the interstate and the intrastate operation. It is an integrated whole."

Even before the *Schwegmann* decision this Court had recognized that the aim of the fair trade laws is "to protect the property—namely, the good will—of the producer, which he still owns." *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193 (1936). Since appellant sells nothing except in interstate commerce, there is no other commerce to which the value of its good will can attach and no other commerce which a suit to preserve that good will can protect. The Commerce Clause safeguards appellant's right to protect the value and good will of its products moving in interstate commerce just as fully as it safeguards the right to sue for the purchase price after sale.

Intervenor's argument (Br. p. 8) that fair trade enforcement in itself constitutes intrastate activity, justifying the application of the New Jersey qualification statute, is at odds with this Court's decision in *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914) that resort to state courts for enforcement of rights arising from interstate commerce cannot be

barred by a qualification statute. The fact that appellant's suit invokes a state statute is irrelevant. Suits to enforce contracts made within the state for the sale of goods in interstate commerce, such as were involved in the *Sioux* and *Furst* cases, are also based on state law; there is no federal law that gives a cause of action for the breach of such a contract. Yet in both these cases this Court held that the state could not constitutionally bar the suit under its qualification statute.* What is important is not who creates the right but the relation of its enforcement to interstate commerce.

Intervenor's reliance on the McGuire Act (Br. p. 9) is difficult to understand; the very fact that it was necessary after the *Schwegmann* decision for Congress to enact the McGuire Act to make state fair trade laws effective identifies fair trade enforcement with interstate commerce.

III.

The New Jersey Qualification Statute as Applied Here Is Unconstitutional.

A. Appellees have not met the basic question of state power.

Conspicuously absent from appellees' briefs is any discussion of appellant's position that the qualification statute as here applied imposes a regulation fundamentally beyond the power of the state. They make no mention of *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951) which reaffirmed the principle that a state may not tax the privilege of engaging in interstate commerce, whatever may be

* The same result was reached in *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912) where the suit to set aside a fraudulent conveyance obviously sought enforcement of a state-created right.

the amount or computation of the tax.* The *Spector* case pointed out that this principle "gives lateral support to one of the cornerstones of our constitutional law. *M'Culloch v. Maryland*" (340 U. S. at 610). This comparison to the immunity of federal instrumentalities brings into sharp focus the total absence of state legislative power over the right to engage in interstate commerce.

As recently as the *Portland Cement* case the Court reiterated that it "has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a state" (358 U. S. at 464). Intervenor's argument (Br. pp. 6, 11) that the New Jersey qualification statute is not a licensing provision purporting to grant the privilege of doing business in New Jersey flies in the face of the New Jersey decisions and the statute itself. By judicial decision the statute has been characterized as one granting a "license". *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 415, 60 Atl. 822, 829 (Ch. 1905). The statute itself provides that the corporation "may surrender the rights, privileges and franchises conferred upon it" by the certificate of authority. N. J. REV. STAT. 14:15-7. This places the statute in square conflict with the constitutional rule which has been the basis for invalidating every qualification statute that has ever come before this Court when applied to interstate commerce.

Appellant's main brief (p. 9) demonstrated the applicability of *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910). Appellees still have no answer to that case except to repeat the statement that it involved a Kansas qualifi-

* The *Spector* case followed *Freeman v. Hewitt*, 329 U. S. 249 (1946), which held that where a tax amounts to a levy on the very process of interstate commerce it is invalid even though non-discriminatory, even though the same result could be accomplished by other means, and even though its deterrent effect on interstate commerce is not precisely calculable.

cation statute more onerous than New Jersey's. They simply ignore *International Textbook Co. v. Peterson*, 218 U. S. 664 (1910), cited in appellant's main brief (p. 10), which invalidated a Wisconsin qualification statute less onerous than the New Jersey statute.

At pages 14 and 15 of appellant's main brief it was shown that this Court and all states other than New Jersey have recognized that qualification statutes, regardless of their particular provisions, cannot be applied to interstate commerce.* The decision in *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944), on which appellees so heavily rely, is no exception. Appellees devote pages to long quotations from the *Union Brokerage* case but never once come to grips with the central distinguishing feature of the case. It involved a corporation which had nothing to do with actual importation or exportation of goods and carried out all of its business transactions entirely within the confines of Minnesota.

In their effort to assimilate the present case to the entirely different line of cases sustaining police power regulation of essentially local matters, appellees cite no case not already dealt with in appellant's main brief except for *Duckworth v. Arkansas*, 314 U. S. 390 (1941). That case dealt with state regulation of traffic in intoxicating liquors—police regulation in the strictest sense. Control of dangerous commodities entering the state has always been recognized as a proper subject of state regulation. See *Crutcher v. Kentucky*, 141 U. S. 47, 61 (1891).

* See also Model Business Corporation Act §99 ¶2(i) (1960 ed.) which embodies this principle and has been enacted in numerous states.

B. Appellees have shown no state need to extend the qualification statute to foreign corporations in interstate commerce.

Appellant's main brief (p. 21) cited *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905) as an authoritative determination that the purpose of the New Jersey qualification statute was to make possible the obtaining of state court jurisdiction over foreign corporations in suits against them. Appellant also pointed out, and neither appellee has disputed, that the qualification statute is no longer needed for this purpose.

In the face of this admitted statutory obsolescence, appellees have been hard pressed to find a state need to justify extending the qualification statute to corporations in interstate commerce. In the court below intervenor devoted its entire brief to the proposition that the function of the qualification statute was to implement the New Jersey Corporation Business Tax by apprising the state of the presence of foreign corporations for tax purposes. It cited no judicial or legislative determination that the statute had any such purpose, and the New Jersey Supreme Court did not adopt its contention.

On the present appeal counsel for intervenor has laboriously contrived a new purpose for the statute as "a regulation of local activity, designed to insure that the laws will be observed and if not, that there will be a presence of corporate responsibility within the state" (Br., p. 12). Again intervenor makes no claim of support for its contention in New Jersey decisions.

The nature and purpose of the statute is a matter for determination by the legislature and courts of New Jersey, not by briefs of counsel. *Sprout v. South Bend*, 277 U. S. 163, 169-70 (1928). But in any event it is difficult to fathom how

the qualification statute can "insure that the laws will be observed." Intervenor can hardly be serious in suggesting (p. 15) that the qualification statute "insures freedom" from gaming establishments and bootleggers. Few enterprises organized for crime would bother to incorporate, and if they did they would hardly reveal their illicit purpose in the papers filed with the Secretary of State. Nor would a criminal enterprise let the qualification statute, as distinguished from the state's criminal laws, deter it.*

Intervenor's brief (p. 15) divides the types of business from which the statute is claimed to "insure freedom" into those which are illegal and those which are lawful but subject to licensing. The only illegal type mentioned is "gaming establishments", obviously a local not an interstate business. The types cited as lawful but subject to licensing are insurance, banking and liquor, but all these are covered by licensing statutes separate and apart from the qualification statute.** Intervenor's argument as to the desirability of such licensing, which would not be affected in the slightest by a reversal here, supplies no reason for extending the qualification statute to interstate commerce.

Intervenor makes the equally farfetched suggestion that the statute protects New Jersey citizens against *ultra vires* corporate transactions (Br. pp. 15-16). Quite apart from any qualification statute, persons dealing with a foreign corporation can obtain the corporate charter from the corporation itself or the state of incorporation. The idea that

* Pursuing its idea to absurdity, intervenor says (p. 15) that but for the qualification statute "a business association might conduct its affairs, through subterfuge, in the guise of a corporation, and thus enjoy the legitimate benefits accruing to a corporation without in fact being one." Obviously if a "business association" is not really a corporation the qualification statute does not apply to it at all.

** N. J. Rev. Stat. 17:32-1-2 (insurance); N. J. Rev. Stat. 17:9A-316,318 (banking); N. J. Rev. Stat. 33:1-2 (liquor).

unless the qualification statute is applied to interstate business New Jersey citizens are at the mercy of foreign corporations, and forced to enter into transactions with them without ascertaining their powers, is fanciful.

There is a curious contradiction in intervenor's concept of the qualification statute. It first states (p. 11) that once the foreign corporation has filed the required statement the statute makes it mandatory upon the Secretary of State to issue a certificate of authority to transact business. Evidently intervenor considers this important to its argument that the statute is not a discretionary licensing provision. Then, in the same paragraph, apparently considering it equally important to show that the statute serves some purpose, intervenor proceeds to stress the responsibility placed upon the Secretary of State to decide whether the purposes of the corporation and its charter warrant issuance of the certificate of authority.

The informational purpose now advanced by intervenor as justification for the New Jersey statute would have been just as applicable to the qualification statutes held unconstitutional in the *Pigg*, *Peterson* and *Furst* cases. Indeed, once again taking refuge in a contradictory argument, intervenor's brief (p. 24) seeks to differentiate the statute involved in *Furst* on the ground that it required the corporation to supply information concerning its assets and liabilities and the amount of capital employed in the state. One would suppose that if information were the justifying consideration the *Furst* statute would have survived the constitutional test.

Although for 50 years the states have not been able to apply qualification statutes to corporations engaged in interstate commerce, there is no claim or showing that local interests have suffered. Significantly, there appears to be no reported decision in which the Attorney General of New

Jersey has invoked the provision of the statute authorizing a penalty against a foreign corporation doing business without a license. The only real purpose the statute now serves is to provide a convenient defense by which defendants, such as the appellee, can avoid their legal responsibilities.

C. Compliance with the qualification statute would burden interstate business.

Nothing in appellees' briefs refutes appellant's demonstration of the burdensome aspects of compliance with the New Jersey qualification statute. As pointed out in appellant's main brief (p. 24), by giving a general consent to suit through appointment of an agent for service of process a foreign corporation would subject itself to suits which otherwise might not be permissible under the "minimum contacts" rule or the Commerce Clause. Intervenor makes no attempt to meet this argument. Appellee Sav-On argues that a foreign corporation would not be estopped from objecting to such an assertion of jurisdiction after complying with the qualification statute, but this Court has held to the contrary. In *Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U. S. 213, 215-16 (1921), the Court, in an opinion by Mr. Justice Holmes, held that a foreign corporation which appoints an agent in compliance with a qualification statute "takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court."

* The decisions of this Court cited by appellee Sav-On (Br., p. 24) for its no-estoppel argument are not applicable. They hold merely that a corporation does not by qualifying impliedly assent to other state statutes which deny it equal protection of the laws. They do not deal with the scope of a corporation's consent to jurisdiction through appointment of an agent for service of process.

In New Jersey this risk is not merely speculative. Its courts have held that service on an agent appointed pursuant to the qualification statute provides jurisdiction over a foreign corporation in a suit by a non-resident on a cause of action arising outside the state. *Quigley Co. v. Asbestos Limited*, 134 N. J. Eq. 312, 35 A. 2d 432 (Ch. 1944). Thus compliance with the New Jersey qualification statute subjects foreign corporations in interstate commerce to suits to which they cannot object on due process or Commerce Clause grounds.

Appellees also fail to meet appellant's contention that New Jersey tax regulations automatically subject a corporation to tax if it obtains a certificate of authority from the Secretary of State. Their position appears to be that appellant would be subject to taxation anyway on the ground that it does business in the state. This position overlooks the fact that the New Jersey tax is levied "for the privilege of doing business" (N. J. Rev. Stat. 54:10A-2) and therefore, as applied to interstate business, is under the ban of the *Spector* case. It is clear on the face of the New Jersey tax regulations that if appellant, by qualifying, becomes the holder of a certificate of authority it can then be met with the claim that, whatever might otherwise have been its taxable status, it has provided New Jersey a basis for taxation. What disposition would be made of that claim is not a matter to be settled here; but there can be little doubt that, at the very least, qualification would face foreign corporations such as appellant with the prospect of long and expensive tax litigation in itself burdensome to interstate commerce.

Thus, even on the test contended for by the appellees, namely a "balancing" of the state's need for the statute against the burden on interstate commerce, the qualification statute is unconstitutional since the statute does burden

interstate commerce without serving any real state need. But appellees are mistaken in their contention that this is the test of constitutionality here. As shown in appellant's main brief, when a state seeks to impose a regulation on the very right to engage in interstate commerce it is acting outside its constitutional province and no "balancing of interests" is involved.

Conclusion.

Since appellant is engaged solely in interstate commerce, and since there is neither reason nor authority for permitting the state to condition appellant's right to carry on that commerce or to sue in its courts, the decision below should be reversed.

Respectfully submitted,

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Supreme Court, U.S.

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JUN 10 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 203.

ELI LILLY AND COMPANY,

Appellant.

vs.

SAV-ON-DRUGS, INC.

AND STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

PETITION OF APPELLANT ELI LILLY
AND COMPANY FOR REHEARING.

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IN THE
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OCTOBER TERM, 1960.

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC. AND STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

**PETITION OF APPELLANT ELI LILLY
AND COMPANY FOR REHEARING.**

This petition for rehearing is filed, with full awareness that it is only in rare instances that such petitions are granted or are appropriate, because of what appears to appellant to be a clear and demonstrable error affecting not merely the present case but the state of the law generally as to what does and what does not constitute interstate commerce.

This petition is directed to a single point: that the decision of the Court is irreconcilable with the *Northwestern Cement* decision of only two years ago. (358 U. S. 450). The *Northwestern Cement* decision, not mentioned in the opinion of the Court, has either been overruled *sub silentio* as to one of its essential points (the nature of the commerce involved) or has been treated, as suggested by the concur-

ring opinion, as having casually and unnecessarily reached a conclusion contrary to the decision in the present case. The activities held by the *Northwestern Cement* decision to be exclusively interstate were identical with those held in the present case to be intrastate.

It is respectfully submitted that if the *Northwestern Cement* decision has been overruled on this point, the opinions in the present case should be clarified in this respect to avoid confusion on the part of both the Bar and the business community, as well as on the part of the Congress in its pending study of the need for further legislation in the light of the *Northwestern Cement* decision. If, on the other hand, the present decision is premised on the statement in the concurring opinion that "the *Northwestern Cement* opinion's characterization of activities similar to those of Lilly as being 'exclusively in furtherance of interstate commerce'" was only "a casual reference which was quite unnecessary to the issue decided by the Court in that case", the error of the premise should be recognized and corrected.

I.

The activities held exclusively interstate in *Northwestern Cement* were on all fours with those held intrastate here.

In the present case the *Northwestern Cement* decision was not rejected as authority on the ground that tax cases are inapplicable on the question as to what is and what is not interstate commerce. On the contrary, both the opinion of the Court and the concurring opinion are based largely on the authority of a tax case, the *Cheney* case (246 U. S. 147), and specifically on its holding that solicitation of orders from local retailers to be turned over to local whole-

salers (so-called "turn-over" orders) constitutes intrastate commerce. It is in this respect that the *Northwestern Cement* decision is entirely inconsistent both with the *Cheney* decision of forty years ago and with the decision in the present case.

Every activity of the present appellant which this Court characterizes as constituting intrastate business was present in the *Northwestern Cement* case and characterized by the decision there as being "exclusively in furtherance of interstate commerce". The Cement Company regularly solicited orders from users of cement to whom it did not sell and who bought only from local dealers (358 U. S. at pp. 454-55; 84 N. W. 2d at p. 378); it maintained a local office, staffed with salesmen and a District Manager (358 U. S. at p. 454; 84 N. W. 2d at p. 378); and the resident salesmen engaged in general promotional activities, systematically contacting non-customer users of cement products "to induce them to buy from taxpayer's established local outlets and dealers, promote goodwill and furnish advertising materials to customers, entertain customers, and occasionally receive and forward complaints" (84 N. W. 2d at p. 378).

Indeed, it is clear from the opinions of both the Minnesota Supreme Court and this Court in the *Northwestern Cement* case that these activities, especially as regards the solicitation of turn-over orders, were more regular, more systematic and more extensive than in the present case. Not even the tenuous distinction between "soliciting" and "inducing" orders is available, for in the *Northwestern Cement* case there were both (358 U. S. at pp. 454-55; 84 N. W. 2d at p. 378).

Thus, it is clear that so far as the factual setting is concerned there is no difference between *Northwestern Cement* and the present case except that the facts here are even stronger for a finding of exclusively interstate busi-

ness. This need not be elaborated further because neither the opinion of the Court nor the concurring opinion takes a contrary position. The only question remaining, unless *Northwestern Cement* has been overruled on this point *sub silentio*, is whether, as stated in the concurring opinion here, the *Northwestern Cement* decision's characterization of the facts as presenting a case of business activities "exclusively in furtherance of interstate commerce" was merely casual and unnecessary.

II.

The *Northwestern Cement* opinion's characterization of activities similar to those of Lilly as being exclusively interstate was vitally necessary to the decision.

There was nothing casual about the Court's *Northwestern Cement* holding that the Cement Company's activities were exclusively interstate. Not only were they repeatedly so characterized in the opinion of the Court, but the point was developed in further detail in the concurring opinion. The concurring opinion devoted whole paragraphs to establishing that prior decisions upholding state taxation did not depend on the existence of any intrastate business (358 U. S. at pp. 466-68). The reason this was important was of course because, as stated by both the state court and this Court, no element of intrastate commerce was present and the sole question was the validity of the tax in the absence of any intrastate business.*

The exclusively interstate character of the commerce involved in *Northwestern Cement* was drawn into addition-

* The Minnesota Court's finding that the commerce involved was exclusively interstate did not and could not require this Court to proceed on that assumption if the record itself showed intrastate commerce to be present. This is clear from both the opinion of the Court and the concurring opinion in the present case.

ally sharp focus in the dissenting opinion of Mr. Justice Whittaker. His dissent, joined in by Mr. Justice Frankfurter and Mr. Justice Stewart, called forceful attention to the fact that the Minnesota statute "in plain terms" purported to tax income derived exclusively from interstate commerce. The dissenters pointed out that the state court and this Court, had they followed the *Cheney* decision, could have found that in fact "the taxpayer was engaged in intra-state commerce in Minnesota" (358 U. S. at pp. 482-83). They agreed, however, that the commerce involved was exclusively interstate but dissented on the constitutional issue.

It is quite apparent from a reading of the dissenting opinions in *Northwestern Cement* that there would have been no dissent on the constitutional question but for the fact, unanimously accepted, that no intrastate commerce was present. That holding is also the only explanation for the prompt response to the decision by the Congress in enacting Public Law 86-272, 73 Stat. 355.

The characterization of the Cement Company's activities as exclusively interstate was essential to the *Northwestern Cement* decision for two reasons:

In the first place, the Minnesota statute under which the tax was imposed was, by its express terms, applicable only if the Cement Company's business within the state consisted "exclusively of foreign commerce, interstate commerce, or both" (358 U. S. at p. 453; 84 N. W. 2d 376).

Secondly, but for the exclusively interstate character of the Cement Company's business this Court would not even have reached the only constitutional question with which it dealt: the state's power to tax income derived exclusively from interstate commerce.* This Court has

* The Cement Company raised no issue as to the fairness of the tax allocation formula or the accuracy of its application. The sole question raised was the constitutionality of a state tax in the total absence of any intrastate business (358 U. S. at pp. 452, 454).

often declared as a cardinal principle that it does not decide constitutional questions unless compelled by the record, however much the parties may want them decided. *Barr v. Mateo*, 355 U. S. 171, 172 (1957); *Neese v. Southern Railway Co.*, 350 U. S. 77, 78 (1955).

It is therefore clear that *Northwestern Cement's* characterization of activities such as Lilly's as exclusively interstate was a deliberate and necessary holding, without which the tax would not have been applicable and the constitutional question would not have been reached. In order to view the finding of exclusively interstate commerce in *Northwestern Cement* as casual and unnecessary, it would be necessary to ascribe to this Court an almost inconceivable action. One would have to assume that this Court, presented with the issue of the validity of a tax inapplicable on its face if any intrastate business was done, casually referred to the company's business as exclusively interstate, even though intrastate business was being done, and rendered a decision which (a) subjected the Cement Company to an inapplicable tax and (b) decided a constitutional question not reached on the facts.

In view of the holding in *Northwestern Cement*, the result of the *Lilly* decision, as it stands, is to leave the law in confusion, not merely as regards the present appellant but for the Bar and business community generally and for the Congress in the continuing study of state taxation and interstate commerce directed by Public Law 86-272, 73 Stat. 555. The concurring opinion in this case notes that this 1959 statute "was passed by Congress in response to our decision in *Northwestern Cement Co. v. Minnesota*, 358 U. S. 450". The statute forbids the states to impose income taxes on corporations in interstate commerce where their only business activity in the state is solicitation of orders, even if those orders consist entirely of turnover orders. In the light of the *Lilly* decision, Congress may well wonder

whether it has forbidden the states to tax activities which the Court now classifies as solely intrastate business.*

Appellant urges that this petition for rehearing be granted and, the Court having already indicated acceptance of appellant's constitutional argument, that the decision below be reversed as upholding an exercise of power by the State of New Jersey that is contrary to the Commerce Clause.

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* One additional comment seems appropriate in view of the statement in the concurring opinion that the Court was not referred to any case in which an interstate seller had been granted an immunity from a state-license requirement where the seller promoted or participated in transactions between a local vendor and a local purchaser involving goods already within the state. A number of such cases were cited in the first paragraph on page 6 of appellant's reply brief. And, of course, unless *Northwestern Cement* is to be rejected as authority because it is a tax case—which would be inconsistent with the Court's reliance on the *Cheney* decision—it too is a case squarely in point.

Certificate..

I, EVERETT I. WILLIS, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/ EVERETT I. WILLIS
EVERETT I. WILLIS,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

No. 203.—OCTOBER TERM, 1960.

Eli Lilly and Company,
Appellant,
v.
Sav-On-Drugs, Inc., et al. } On Appeal From the Su-
preme Court of the State
of New Jersey.

[May 22, 1961.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellant Eli Lilly and Company, an Indiana corporation dealing in pharmaceutical products, brought this action in a New Jersey state court to enjoin the appellee Sav-On-Drugs, Inc., a New Jersey corporation, from selling Lilly's products in New Jersey at prices lower than those fixed in minimum retail price contracts into which Lilly had entered with a number of New Jersey drug retailers. Sav-On had itself signed no such contract but, under the New Jersey Fair Trade Act, prices so established become obligatory upon nonsigning retailers who have notice that the manufacturer has made these contracts with other retailers.¹ Sav-On moved to dismiss this complaint under a New Jersey statute that denies a foreign corporation transacting business in the State the right to bring any action in New Jersey upon any contract made there unless and until it files with the New Jersey Secretary of State a copy of its charter together with a limited amount of information about its

¹ N. J. Rev. Stat. 56:4-6. The legality of such arrangements insofar as the antitrust laws are concerned was provided for by the Maguire Act, 15 U. S. C. § 1.

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operations² and obtains from him a certificate authorizing it to do business in the State.³

Lilly opposed the motion to dismiss, urging that its business in New Jersey was entirely in interstate commerce and arguing, upon that ground, that the attempt to require it to file the necessary information and obtain a certificate for its New Jersey business was forbidden by the Commerce Clause of the Federal Constitution. Both parties offered evidence to the Court in the nature of affidavits as to the extent and kind of business done by Lilly with New Jersey companies and people. On this evidence, the trial court made findings of fact and granted Sav-On's motion to dismiss, stating as its ground that "the conclusion is inescapable that the plaintiff [Lilly] was in fact doing business in this State at the time of the acts complained of and was required to, but did not, comply with the provisions of the Corporation Act."⁴ On appeal to the Supreme Court of New Jersey, this constitutional attack was renewed and the State Attorney General was permitted to intervene as a party-defendant to defend the validity of the statute. The State Supreme Court then affirmed the judgment upholding the statute, relying entirely upon the opinion of the trial court.⁵ We noted probable jurisdiction to consider Lilly's contention that the constitutional question was improperly decided by the state courts.⁶

² The information required is: (1) the amount of the corporation's authorized capital stock; (2) the amount of stock actually issued by the corporation; (3) the character of the business which the corporation intends to transact in New Jersey; (4) the principal office of the corporation in New Jersey; and (5) the name and place of abode of an agent upon whom process against the corporation may be served. N. J. Rev. Stat. 14:15-3.

³ N. J. Rev. Stat. 14:15-4.

⁴ 57 N. J. Super. 291, 302, 154 A. 2d 650, 656.

⁵ 31 N. J. 591, 158 A. 2d 528.

⁶ 364 U. S. 860.

The record shows that the New Jersey trade in Lilly's pharmaceutical products is carried on through both interstate and intrastate channels. Lilly manufactures these products and sells them in interstate commerce to certain selected New Jersey wholesalers. These wholesalers then sell the products in intrastate commerce to New Jersey hospitals, physicians and retail drug stores, and these retail stores in turn sell them, again in intrastate commerce, to the general public. It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers.¹ Under the authority of the so-called "drummer" cases, such as *Robbins v. Taxing District of Shelby County*,² Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State. On the other hand, it is equally well settled that if Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business.³ In such a situation, Lilly could not escape state regulation merely because it is also engaged in interstate commerce. We must then look to the record to determine whether Lilly is engaged in intrastate commerce in New Jersey.

The findings of the trial court, based as they are upon uncontested evidence presented to it, show clearly

¹ See, e. g., *Crutcher v. Kentucky*, 141 U. S. 47; *International Textbook Co. v. Pigg*, 217 U. S. 91; *Sioux Remedy Co. v. Cope*, 235 U. S. 197.

² 120 U. S. 489. The *Robbins* case has been followed in a long line of subsequent decisions by this Court. A partial list of these cases is set out in *Memphis Steam Laundry v. Stone*, 342 U. S. 389, 392-393, n. 7.

³ See, e. g., *Railway Express Co. v. Virginia*, 282 U. S. 440. Cf. *Union Brokerage Co. v. Jensen*, 322 U. S. 202, especially at 211-212.

that Lilly is conducting an intrastate as well as an interstate business in New Jersey:

"The facts are these: Plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building. (The September 1959 issue of the Newark Telephone Directory lists the plaintiff, both in the regular section and in the classified section under 'Pharmaceutical Products,' as having an office at 60 Park Place, Newark.) The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino 'for all expenses incidental to the maintenance and operation of said office.' There is a secretary in the office, who is paid directly by the plaintiff on a salary basis. There are eighteen 'detailmen' under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commission. Many, if not all of them, reside in the State of New Jersey. Whether plaintiff pays unemployment or other taxes to the State of New Jersey is not stated. It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is 'promotional and informational only.' On an occasion, these detailmen, 'as a service to the retailer,' may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising

and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield store.¹⁰

We agree with the trial court that "[t]o hold under the facts above recited that plaintiff [Lilly] is not doing business in New Jersey is to completely ignore reality."¹¹ Eighteen "detailmen," working out of a big office in Newark, New Jersey, with Lilly's name on the door and in the lobby of the building, and with Lilly's district manager and secretary in charge, have been regularly engaged in work for Lilly which relates directly to the intrastate aspects of the sale of Lilly's products. These eighteen "detailmen" have been traveling throughout the State of New Jersey promoting the sales of Lilly's products, not to the wholesalers, Lilly's interstate customers, but to the physicians, hospitals and retailers who buy those products in intrastate commerce from the wholesalers. To this end, they have provided these hospitals, physicians and retailers with up-to-date knowledge of Lilly's products and with free advertising and promotional material designed to encourage the general public to make more intrastate purchases of Lilly's products. And they sometimes even directly participate in the intrastate sales themselves by transmitting orders from the hospitals, physicians and drug stores they service to the New Jersey wholesalers.

This Court had a somewhat similar problem before it in *Cheney Brothers Co. v. Massachusetts*.¹² In that case, the Northwestern Consolidated Milling Company of Minne-

¹⁰ 57 N. J. Super., at 298-299, 154 A. 2d, at 654.

¹¹ *Id.*, at 300, 154 A. 2d, at 655.

¹² 246 U. S. 147.

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sota had been conducting business in Massachusetts in a manner quite similar to that being used by Lilly in New Jersey—a number of wholesalers were buying Northwestern's flour in interstate commerce and selling it to retail stores in Massachusetts in intrastate commerce. Northwestern had in Massachusetts, in addition to any force of drummers it may have had to promote its interstate sales to the wholesalers, a group of salesmen who traveled the State promoting the sale of flour by Massachusetts wholesalers to Massachusetts retailers. These salesmen also solicited orders from the retail dealers and turned them over to the nearest Massachusetts wholesaler. Despite this substantial connection with the intrastate business in Massachusetts, Northwestern contended that its business was wholly in interstate commerce—a contention that this Court disposed of summarily in the following words: "Of course this is a domestic business,—inducing one local merchant to buy a particular class of goods from another."¹³

Lilly attempts to distinguish the holding in the *Cheney* case on the ground that here its detailmen are not engaged in a systematic solicitation of orders from the retailers. It is true that the record in the *Cheney* case shows a more regular solicitation of orders than does the record here. But that difference is not enough to distinguish the cases. For the record shows that Lilly here, no less than Northwestern there, engages in a "domestic business,—inducing," as the Court said of Northwestern, "one local merchant to buy a particular class of goods from another." The fact that the business of "inducing" intrastate sales, as engaged in by Lilly, is primarily a promotional and service business which does not include a systematic solicitation of orders goes only to the nature of the intrastate business Lilly is carry-

¹³ *Id.*, at 155.

ing on, not to the question of whether it is carrying on an intrastate business.

Lilly also contends that—even if it is engaged in intra-state commerce in New Jersey and can by virtue of that fact be required to get a license to do business in that State, New Jersey cannot properly deny it access to the courts in this case because the suit is one arising out of the interstate aspects of its business. In this regard, Lilly relies upon such cases as *International Textbook Co. v. Pigg*,¹⁴ holding that a State cannot condition the right of a foreign corporation to sue upon a contract for the interstate sale of goods. We do not think that those cases are applicable here, however, for the present suit is not of that kind. Here, Lilly is suing upon a contract entirely separable from any particular interstate sale and the power of the State is consequently not limited by cases involving such contracts.

What we have said would be enough to dispose of this case were it not for the contention that the question of whether Lilly is engaged in interstate commerce in New Jersey is not properly before us. This contention is based upon Lilly's interpretation of the decision of the New Jersey court as resting upon the assumption that Lilly has been engaged in interstate commerce only. We cannot accept that contention because, in the first place, it rests upon a completely erroneous interpretation of the New Jersey court's opinion. That court was called upon to decide whether appellant was "transacting business" in New Jersey within the meaning of the statute which requires the registration of foreign corporations. In deciding that question, the court relied upon the facts set out in the affidavits with regard to the various local activities of Lilly as summarized in the findings quoted above. The only reasonable inference from these findings is that

¹⁴ 217 U. S. 91. See also *Furst v. Brewster*, 282 U. S. 493; *Sioux Remedy Co. v. Cope*, 235 U. S. 197.

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the trial court interpreted the phrase "transacting business" in the New Jersey statute to mean transacting local intrastate business and concluded from the facts it found that Lilly was transacting such business. This conclusion is reinforced by a subsequent New Jersey opinion that distinguishes the decision in this case on precisely that ground.¹⁵

But even if the opinion of the court below should, as is urged, be interpreted as resting upon the mistaken belief that appellant could be required to register, even though it transacted no business whatever in New Jersey except interstate business, we think it would still be necessary to affirm the decision of that court on the record presently before us. That record clearly shows that Lilly was, as a matter of fact, engaged in local intrastate business in New Jersey through the employees it kept there to induce retailers, physicians and hospitals to buy Lilly's products from New Jersey wholesalers in intrastate commerce. So even if the state court had rested its conclusions on an improper ground, this Court could not, in view of the undisputed facts establishing its validity, declare a solemn act of the State of New Jersey unconstitutional. The record clearly supports the judgment of the New Jersey Supreme Court and that judgment must therefore be and is.

Affirmed.

¹⁵ *United States Time Corp. v. Grand Union Co.*, 64 N. J. Super. 39, especially at 45-46, 165 A. 2d 310, 313-314.

SUPREME COURT OF THE UNITED STATES

No. 203.—OCTOBER TERM, 1960.

Eli Lilly and Company,
Appellant,
v.
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[May 22, 1961.]

MR. JUSTICE HARLAN, concurring.

On the premise that New Jersey cannot impede an out-of-state seller's access to the state market,¹ the difficult issue presented in this case is how much more than shipping its goods into New Jersey Lilly may do within the State without subjecting itself to the requirements and sanctions of New Jersey's licensing laws. In joining the Court's opinion, I think some further observations appropriate.

It is clear that sending "drummers" into New Jersey seeking customers to whom Lilly's goods may be sold and shipped, *Robbins v. Shelby County Taxing District*, 120 U. S. 489, and suing in the state courts to enforce contracts for sales from an out-of-state store of goods, *International Textbook v. Pigg*, 217 U. S. 91, are both so intimately connected with Lilly's right to access to the local market, free of local controls, that they cannot be

¹ Because I am of the view that Eli Lilly has engaged in "local business" in New Jersey, there is no need now to consider whether a wholly interstate business enjoys the same degree of immunity from state licensing provisions when the state requirement is regulatory as it does when the state requirement is purely a tax measure. Compare *California v. Thompson*, 313 U. S. 109, and *Union Brokerage Co. v. Jensen*, 322 U. S. 202, with *Nippert v. Richmond*, 327 U. S. 416 and *Spector Motor Service Inc., v. O'Connor*, 340 U. S. 602; and see Powell, *Vagaries and Varieties in Constitutional Interpretation*, 172-176, 186-187.

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separated off as "local business" even if they are conducted wholly within New Jersey. However, I do not think that the systematic promotion of Lilly's products among local retailers and consumers who, as Lilly conducts its affairs, can only purchase them from a New Jersey wholesaler bears the same close relationship to the necessities of keeping the channels of interstate commerce state-unburdened. I believe that New Jersey can treat as "local business" such promotional activities, which are pointed at and result initially in local sales by Lilly's customers, and not in direct sales from its own out-of-state store of goods.² Three factors, particularly, persuade me to that view.

² There can be no doubt that the "promotional and informational" activities of Lilly in New Jersey were specifically aimed at securing retail and consumer trade for its local wholesalers. One of the two affidavits submitted by Lilly in opposition to the motion below states:

"The primary purpose of said employees [stationed in New Jersey] is to acquaint retail pharmacists, physicians, and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians, and hospitals will order Lilly products from local wholesale distributors."

The other such affidavit states:

"It is the function of said detail men [Lilly employees stationed in New Jersey] only to visit retail pharmacists, physicians and hospitals and to acquaint same with the various products of Eli Lilly and Company, with a view to encouraging the purchase and use of said retail products by such institutions and professional men. The work of the detail-men is promotional and informational only. They do not accept orders under any circumstances for the purchase of Eli Lilly and Company products. Products of Eli Lilly and Company are sold to retailers in the State of New Jersey by wholesale distributors. On occasion, detail men of Eli Lilly and Company may, as a service to the retailer, receive an order for Eli Lilly and Company products only for the purpose of transmitting same to the wholesaler. Orders so received and transmitted are then subject to acceptance or rejection by the wholesaler."

To the same effect are the findings of the state court which are set forth in this Court's opinion. *Ante*, p. —.

First: A licensing requirement is applied in this situation, does not deny Lilly a significant opportunity to reach New Jersey customers. Petitioner remains free, and is constitutionally entitled to remain free, to solicit purchases directly by New Jersey retailers and consumers or, alternatively, to rely on its wholesalers to develop the New Jersey market. Thus, Lilly is not in the position of the manufacturer with whose protection Mr. Justice Bradley was concerned when, in *Robbins v. Shelley County, supra*, at 494, he asked: "How is a manufacturer or a merchant of one state, to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them?"

Second: Were Lilly, for a distinct consideration, to enter into an arrangement with its New Jersey wholesalers to promote or solicit business within the State for their account, I would suppose it scarcely doubtful that such an endeavor would constitute a local incident subject to the State's licensing power, even though the ultimate purpose and effect of the arrangement itself were also to enhance Lilly's own interstate business. I do not see why New Jersey must treat differently Lilly's present activities, which in fact redound both to the wholesalers' benefit, by lessening the need for promotional effort and expense on their part, and to Lilly's profit, in the form of increased orders from wholesalers. See *Cheney Brothers v. Massachusetts*, 246 U. S. 147; cf. *Norton v. Depart-*

³ I recognize that the force of the *Cheney Brothers* case, at least in the field of state income taxation, has been impaired by Public Law 86-272, 73 Stat. 555, which was passed by the Congress in response to our decision in *Northwestern Cement Co. v. Minnesota*, 358 U. S. 450. Even so, it should be observed that the statute, which immunizes from the reach of state income taxation a foreign concern's intrastate solicitation of orders "for the benefit of a prospective [interstate] customer," does not include within such immu-

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ment of Revenue, 340 U. S. 534, 536, 537-539. A different constitutional result is not indicated by the circumstance that no consideration, other than the purchase price for goods bought, is paid Lilly by the wholesalers and that the benefit to Lilly from such local service comes from the resulting increase in interstate sales. The essential point is that Lilly's New Jersey activities were "wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated." *Browning v. Waycross*, 233 U. S. 16, 22-23.*

Third: I cannot agree that the effect of the decision in this case "is to repudiate the whole line of 'drummer' cases." We have not been referred to any case in which an interstate seller has been granted an immunity from a state-license requirement where the seller has promoted or participated in transactions between a local vendor and a local purchaser involving goods already within the

nity situations where the foreign seller maintains a local office for the purpose of such solicitation. See § 101 (e) of the statute and 105 Cong. Rec. 16469-16477. Lilly maintains an office in New Jersey in connection with its promotional activities. Reliance on the *Northwestern Cement* opinion's characterization of activities similar to those of Lilly as being "exclusively in furtherance of interstate commerce" seems to me to be stretching too far a casual reference which was quite unnecessary to the issue decided by the Court in that case.

* In the *Browning* case an agent of an out-of-state seller of lightning rods, who was engaged in installing lightning rods, purchased in interstate commerce, for the customers of such seller, was held subject to a state tax on the occupation of erecting lighting rods, despite the fact that the contract, for the purchase of such rods obligated the seller to install the rods at its own expense. The Court observed that "it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause." *Id.*, at p. 23.

State. Cf. *Wagner v. City of Covington*, 251 U. S. 95. The only aspect of the present case that resembles the "drummer" cases is the fact that Lilly's promotion of local sales ultimately serves to increase its interstate sales. To treat this factor as bringing the present situation within the drummer cases would, in my view, be substantially to extend the reach of those cases. I am not prepared to subscribe to such an extension at the expense of state power to regulate the promotion of sales of goods owned and located within the State when the countervailing federal considerations are as thin as they seem to me to be here, and when the interstate seller remains free to enjoy the immunities of interstate commerce by simply restricting its promotion to those who may buy from its own out-of-state store of goods.

Finally, while I am less clear than the rest of the majority that the state courts based their decision on a finding of "local business," I do not believe that any doubt on that score forecloses us from now sustaining the State on that ground where, as here, the facts leading to that conclusion are not in dispute. See *Nashville, C. & St. L. R. Co., v. Browning*, 310 U. S. 362.⁵

⁵ I do not regard such cases as *Sprout v. South Bend*, 277 U. S. 163, and *Leloup v. Port of Mobile*, 127 U. S. 640, as controlling contrary authority in light of the opinion of the New Jersey Superior Court which suggests that the state statute may apply only to constitutionally licensable local business. In this regard see the Superior Court's later opinion in *United States Time Corp. v. Grand Union Co.*, 64 N. J. Super. 39.

SUPREME COURT OF THE UNITED STATES

No. 203.—OCTOBER TERM, 1960.

Eli Lilly and Company,
Appellant,
v.
Sav-On-Drugs, Inc., et al. } On Appeal From the Su-
preme Court of the State
of New Jersey.

[May 22, 1961.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART concur, dissenting.

The Court, with all deference, blends in this opinion three distinct lines of decisions which until today have been considered separate. They do indeed present different problems one from the other. I refer to our decisions concerning the power of a State (1) to tax an interstate enterprise, (2) to subject it to local suits, and (3) to license it.

(1) If New Jersey sought to collect from petitioner a tax apportioned to some local business activity which it carries on in *that State*, I would see no constitutional objection to it. *Northwestern Cement Co. v. Minnesota*, 358 U. S. 450. Such an apportioned tax imposed by New Jersey would have relation "to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred." *Wisconsin v. Penney Co.*, 311 U. S. 435, 444.

(2) If petitioner were sued in New Jersey, I think its connections with that State have been sufficient to make it subject to the jurisdiction of the state courts (*International Shoe Co. v. Washington*, 326 U. S. 310), at least as to suits which reveal a "substantial connection" with the State. *McGee v. International Life Ins. Co.*, 355 U. S. 220. Cf. *Hanson v. Denckla*, 357 U. S. 235, 250-255.

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(3) The present case falls in neither of those two categories. New Jersey demands that petitioner obtain from it a certificate authorizing it to do business in the State, absent which she denies petitioner access to her courts. The case thus presents the strikingly different issue—whether an interstate business can be subjected to a licensing system.

I put to one side cases such as *Union Brokerage Co. v. Jensen*, 322 U. S. 202, and *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, where the issue was whether a company doing business in the State was exempt from a regulation of this kind because Congress had subjected it to a licensing system. I also put to one side *Railway Express Co. v. Virginia*, 282 U. S. 440, where a company, doing an intrastate* as well as an interstate express business, was required to obtain a certificate authorizing it to conduct an intrastate business. The question here is whether a State can require a license for the doing of an interstate business. The power to license the exercise of a federal right, like the power to tax it, is "the power to control or suppress its enjoyment." *Murdock, v. Pennsylvania*, 319 U. S. 105, 112. Soliciting interstate business has up to this day been on the same basis as doing an interstate business, so far as the protection of the Commerce Clause is concerned. It has usually been argued that soliciting interstate business is a "local activity" that can be licensed by a State or on which a State may lay a privilege tax. That was the argument in *Nippert v. Richmond*, 327 U. S. 416, 420; *Memphis Steam Laundry v. Stone*, 342 U. S. 389, 392. We rejected it, pointing out that in the long line of cases beginning with *Robbins v. Shelby County*, 120 U. S. 489, "this Court has held that a tax

*In that case the express company picked up and delivered articles within Virginia as well as shipped other articles into and outside the State.

imposed upon the solicitation of interstate business is a tax upon interstate commerce itself." 342 U. S. 392-393.

What petitioner's employees do in New Jersey is certainly no more than what a "drummer" for an interstate house does. The record shows that petitioner's employees engage in the following activities in New Jersey:

"It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is 'promotional and informational only.' On an occasion, these detailmen, 'as a service to the retailer,' may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical professions, without cost to defendant. The same thing occurred when defendant opened its Plainfield stores."

In *Robbins v. Shelby Taxing District*, *supra*, p. 491, the "drummer" who failed to take out a license from the State was doing the following:

"Sabine Robbins . . . a citizen and resident of Cincinnati, Ohio, . . . was engaged in the business of drumming in the Taxing District of Shelby County, Tenn.; *i. e.*, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members

of said firm being citizens and residents of Cincinnati, Ohio."

In this case, appellant's employees within the State were engaged solely in the "drumming up" of appellant's interstate trade. They did this, not by direct solicitation of the interstate buyers, but by contacts with the customers of the buyers. Such activities were said to be "exclusively in furtherance of interstate commerce" only two years ago in *Northwestern Cement Co. v. Minnesota, supra*, 452, 455. Yet today the Court finds these activities to be separable from appellant's interstate business; appellant is "inducing" sales, not "soliciting" them. It is not a distinction I can accept.

We deal here with a general state regulatory measure. Under our precedents, access to state courts cannot be barred to "a foreign corporation merely coming into [the State] to contribute to or to conclude a unitary interstate transaction." *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 211. Yet that is what New Jersey claims the power to do. We have struck down similar state requirements which barred access to state courts to recover the purchase price on an interstate contract, *International Text-book Co. v. Pigg*, 217 U. S. 91, to recover for the breach of an interstate contract of sale, *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, and to attack as fraudulent the transfer of assets of a domestic debtor, *Buck Stove Co. v. Vickers*, 226 U. S. 205. Surely, the cause of action here asserted does not involve a state interest more compelling than the protection of domestic debtors or the stability of title to domestic lands.

The Court places special reliance on *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 155, where Massachusetts' imposition of an "excise tax" on the Northwestern Consolidated Milling Company was upheld. There the entire activity of the foreign corporation's activities in the State was the direct solicitation of orders

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for local wholesalers. Here the *dominant* activity is nothing more than advertising and public relations. These are the minimum activities in which every "drummer" for an out-of-state concern engages.

To hold that New Jersey can license petitioner in this case is to repudiate the whole line of "drummer" cases.

This case on its own may do little injury. But it provides the formula whereby a State can stand over the channels of interstate commerce in a way that promises to do great harm to the national market that heretofore the Commerce Clause has protected.